IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-908

DR. JOHN G. MADRY, JR.,
Petitioner,

v.

DR. OTTO G. SOREL, DR. EDITH K. MANGONE, DR. JOHN T. BLACKBURN, DR. D. W. McMILLAN, BREVARD HOSPITAL ASSOCIATION, INC., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

THEODORE M. FORBES, JR.
GAMBRELL, RUSSELL, KILLORIN & FORBES
4000 First National Bank Tower
Atlanta, Georgia 30303

WILLIAM H. GLEASON
P.O. Box 3266
Indialantic
Melbourne, Florida 32903
723-5121 (A.C. 305)

THORWALD J. HUSFELD
LANDIS, GRAHAM, FRENCH, HUSFELD, SHERMAN & FORD, P.A.
110 West Indiana Avenue
P.O. Box 329
DeLand, Florida 32720

Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

Petitioner John G. Madry, Jr. respectfully prays for a writ of certiorari to review the judgment and opinion on appeal entered August 29, 1977 and the order denying rehearing and rehearing *en banc* entered September 30, 1977 by the United States Court of Appeals for the Fifth Circuit.

[1] The individual members of the Board of Governors were named as defendants. They are: James E. Holmes, Chairman; Frederick L. McFarlin; Bernice S. Newell; R. P. Sullivan, Jr.; Harold E. O'Kelley; Dr. T. J. Kaminski; Dr. John M. Langstaff; Kathryn R. Lowery; Bernice A. Maxwell; John F. Turner, Jr.; Charles F. West; and James A. Sewell.

OPINIONS BELOW

The order of the United States District Court for the Middle District of Florida is not reported; copy thereof is set forth in the Appendix hereto. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 558 F.2d 303, and copy is included in the Appendix hereto. The order of the Court of Appeals denying rehearing and rehearing *en banc* is noted at 561 F.2d 831; copy of letter informing counsel of that ruling appears in the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 29, 1977. Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing *En Banc*, which was denied on September 30, 1977. This petition for certiorari is filed within ninety days of the latter date. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) (1970 ed.).

THE QUESTION PRESENTED

Is sufficient "state action" present to invoke the "Federal question" jurisdiction of a United States District Court over a suit by a physician who asserts that his summary discharge from the Medical Staff of the only hospital in his home City of Melbourne, Florida denied him "due proceess of law," in violation of the Fifth and Fourteenth Amendments to the United States Constitution, when the defendant hospital is financed to the extent of 48% by a Federal Hill-Burton grant paid through the State of Florida pursuant to a State-wide plan for hospital construction adopted by the State of Florida and approved by the Surgeon General of the United States; and such hospital is situated on twelve acres of land acquired by it from the City of Melbourne for the nominal consideration of $1.00 following a public referendum approving the sale for that price; and such hospital has been expanded under the Hill-Burton program with 31% Federal funds; and elected county and municipal officials *ex officio* comprise a majority of that hospital's Board of Governors; and such hospital provides subsidized medical care to county welfare patients; and such hospital is exempt by statute from ad valorem taxes?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V:

> *No person shall* be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor *be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation. (Emphasis added)

United States Constitution, Amendment XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty,*

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added)

28 U.S.C. §1331 (a) (1970 ed.):

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

42 U.S.C.A. § 1983, 17 Stat. 13:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Hospital Survey and Construction Act, 60 Stat. 1041 *et seq.*, as amended by Hospital Survey and Construction Amendments of 1949, 63 Stat. 898 *et seq.*, and Hospital and Medical Facilities Amendments of 1964, 78 Stat. 447, *et seq.*

Those statutes (popularly known as the "Hill-Burton Act") appear at 42 U.S.C.A. §§ 291 *ff.* By reason of their length, they are set out separately in the Appendix hereto.

Health Programs Extension Act of 1973, 87 Stat. 91, section 401(b). This law also is set out in the Appendix hereto.

STATEMENT OF THE CASE

The question raised in this Petition is whether a publicly-controlled hospital, largely financed by Hill-Burton money[2] and displaying other indicia of State direction and participation, is so imbued with State activity that it must comply with "due process of law" under the United States Constitution. If the hospital is subject to the requirements of due process, then Petitioner's action arises under the Constitution and laws of the United States, and the Court of Appeals erred in holding that there was no "Federal question" jurisdiction.

The Respondent Brevard Hospital, Inc., which owns and operates "Brevard Hospital," on May 27, 1966 removed Petitioner from its Medical Staff in a manner found by the District Judge (R. 613)[3] not to have met the requirements of due process of law. Brevard Hospital is not only the only hospital in the City of Melbourne, it is the only hospital within 22 miles (R. 8). Its Medical Staff comprises the physicians whom the respondent Hospital allows to treat patients in its facility. Revocation of Petitioner's membership thus denied him the right to practice his specialty of obstetrics-gynecology in the only hospital in the area (R. 3). (Brevard Hospital alleged that Petitioner had violated its rules by sterilizing a female patient without her written consent. The merits of that issue are not presented or involved in the question that Petitioner asks this Court to adjudicate.)

Petitioner attempted unsuccessfully to get reinstated to the Medical Staff on five occasions over three years, before filing

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[2] Federal funds appropriated specifically for hospital construction under the Hill-Burton Act (set forth in the Appendix hereto).

[3] The original record is cited as R. —— herein. Pages of the original record are shown in the printed Joint Appendix from the Court below.

the instant action in the United States District Court for the Middle District of Florida on June 27, 1969, to compel reinstatement by court order. Petitioner averred jurisdiction under 28 U.S.C. § 1331 (a) on the ground that the action of the Hospital constituted "state" action for purposes of the Fifth and Fourteenth Amendments and 42 U.S.C.A. § 1983, 17 Stat. 13.

On July 15, 1971 (R. 612-14) and again on January 22, 1975 (R. 1371-82)[4] the District Judge ruled that Federal Court jurisdiction existed by reason of the Hill-Burton financing and other state involvements of Brevard Hospital, citing *Sosa v. Board of Managers of Val Verde Memorial Hospital*, 437 F.2d 173 (5th Cir. 1971).[5]

On February 17, 1976, the District Judge entered an Order (R. 1683-86 and commencing on page A-5 of the Appendix hereto) dismissing the case for lack of Federal jurisdiction on authority of *Greco v. Orange Memorial Hospital Corporation*, 513 F.2d 873 (5th Cir.),[6] *cert. denied*, 423 U.S. 1000 (1975).

In *Sosa*, the Fifth Circuit Court of Appeals had held that Federal and State financing of a hospital under the Hill-Burton Act together with some minimal State involvement constituted the requisite State action to entitle a physician denied medical staff privileges on non-racial grounds to a due process hearing under the Fourteenth Amendment. In *Greco*, a different panel of that Court concluded that "absent a charge of racial discrimination" (513 F.2d at 882), Federal jurisdiction does not exist although the operative jurisdictional facts in the *Sosa* and

[4] The January 22, 1975 ruling contains important findings of fact concerning "state action." It is reproduced in the Appendix hereto commencing at page A-47.

[5] For convenience, this decision is reproduced in the Appendix hereto, commencing at page A-37.

[6] For convenience, this decision is reproduced in the Appendix hereto, commencing at page A-17.

Greco cases were substantially the same. The *Greco* decision did not mention *Sosa*.

The following facts of record establish Brevard Hospital's "state" identity. (See Order at p. A-47, *post*.)

Brevard Hospital Association, Inc., was chartered as a non-profit corporation under Florida law, on August 7, 1931 (R. 258-63). In the middle of the Great Depression, a benefactor donated to it a tract of land on the North Dixie Highway in the City of Melbourne ("the City"). Shortly thereafter, the Hospital and the City entered into an agreement by which the Hospital was to convey that tract to the City and the City was to obtain a loan from the Public Works Administration (a Federal agency) to provide funds for construction of a hospital building. If the City were to fail to get the loan, or upon repayment of the loan, the property was to be deeded back to the Hospital (R. 255).

Pursuant to the agreement, the Hospital deeded the land to the City, and the City in November 1935 applied to the Public Works Administration for a loan equal to 45% of the cost of the Hospital building (but not to exceed $20,450). The loan was granted, and the City held a referendum election as to whether it should issue $30,000 in revenue certificates to finance the balance of the cost of construction. The vote was "yes," the certificates were issued, and construction commenced. In June 1937 the City accepted the hospital building as complete (R. 255). During the ensuing eight years, the Hospital was managed under City supervision (R. 256).

In 1945 the Reconstruction Finance Corporation (also a Federal instrumentality) held the outstanding $18,000 of revenue certificates, and the Hospital embarked upon a program of retiring them. In February of 1945 the City Commission of Melbourne, finding that retirement of the indebtedness would be "for the benefit of the Hospital, the City and the public in general,"

appropriated $1,000 for that purpose and authorized the City to give the Hospital a non-interest bearing note for $2,000 so as to require the City to make similar payments during the next two years (R. 329). In the meantime the Brevard Hospital Association apparently had conducted a successful solicitation of contributions, because four weeks later the City Commission received from the Association enough money to redeem the certificates in full, which was done (R. 329-30).

Seven years later, the Melbourne City Commission, on February 12, 1952, authorized the appropriation of $4,500 to the Hospital to enable it to complete construction of a new wing (R. 331).

By 1956, plans were afoot for construction of a new hospital building. The City Commission called a special election for April 24, 1956 to determine if it should sell lots 392 through 461 of Woodlawn Park subdivision, a 12 acre tract (R. 7), to the Hospital for one dollar (R. 332). The affirmative carried overwhelmingly, and the City Commission accordingly on May 9, 1956 directed the Mayor and City Clerk to convey the land to the Hospital for $1, subject to the conditions that unless construction of the building were "substantially begun" in five years and the facility in use in six years, the land would revert to the City (R. 334-35). The District Judge found the one dollar payment to be a "nominal consideration" (R. 1371, page A-47, *post*).

Having acquired the land for a new hospital building, the Hospital then applied to and through the appropriate State agency for a grant of Federal funds under the Hill-Burton Act (R. 1316). Sections 623, 624 and 625 of the 1946 Hill-Burton legislation[7] require each State to submit a hospital development

[7] References herein to sections of the Hill-Burton legislation are to Title VI of the Public Health Service Act, 58 Stat. 682, which Title was added by Section 2 of the Hospital Survey and Construction Act (set out in full beginning at p. A-56, *post*). The latter

plan to the Surgeon General of the United States. After he approves it, the Federal money is allocated to the State. An individual hospital applies to the State agency. If the State agency and the Surgeon General both approve the hospital's plans, then the State is authorized to grant the Federal funds to the hospital for construction.

The foregoing procedures were carried out, and Brevard Hospital obtained a Hill-Burton grant of $1,010,000. It added thereto $1,114,827 from other sources, including sale of the original hospital site and building that the City had helped pay for (R. 7), and including funds received from a public fund-raising drive (R. 7, 257).

The Hospital has continued to receive additional public support since it dismissed Dr. Madry in 1966. In 1968 it completed a $3.5 million expansion with the aid of a Federal grant in excess of $1.3 million (R. 257), and in 1974 it was arranging another expansion by a Hill-Burton loan guarantee, which would guarantee 90% of a $3.2 million loan and pay three percentage points of the interest due the lender. The loan commitment was contingent upon Federal approval of the lender and the interest rate (R. 1313-15).

Further evidencing local government financial support of the Hospital, on April 17, 1969, the Brevard County Commission authorized the County Engineer to use County equipment and labor to repave the Hospital's parking lot up to a cost of $1,850, to be paid from the County's General Fund (R. 1437; see also R. 1312).

At the time of Dr. Madry's dismissal, the corporate by-laws of the Brevard Hospital Association, Inc. provided for a Board

Act was the original "Hill-Burton Act." In 1964 Title VI was revised and its sections renumbered (see Hospital and Medical Facilities Amendments of 1964 ,p. A-82, *post*). The provisions relevant to the issues here remained substantively unchanged. As Brevard Hospital was financed and built before 1964, petitioner has cited herein the 1946 Act as amended in 1949 (Hospital Survey and Construction Amendments of 1949, p. A-74, *post*).

of Governors comprising the Mayors of all the incorporated municipalities in Districts 3 and 5 (11 mayors), plus the two County Commissioners from those Districts, plus 12 elected members of the Association (R. 84). The Mayors and County Commissioners were largely inactive, but the District Judge found that they were entitled to vote at meetings of the Board and were in position to influence its decisions (Order of January 22, 1975; R. 1371, 1373; page A-49, *post*).

Brevard County depends upon the Hospital to care for its welfare recipients who are ill. The Hospital receives from the County a reduced fee per patient that is less than the cost of providing the service (R. 1305-07). The Hospital is required by § 622 of the Hill-Burton legislation to provide "a reasonable volume of hospital services to persons unable to pay therefor," as a condition of receiving *and retaining* its Federal grant. Both the lowered charge to the Hospital for County patients and the fact that the Hospital is exempt from ad valorem taxes under § 196.122, Fla. Stat. reflect the interdependence of County and Hospital.

REASONS FOR GRANTING THE WRIT

1. The decision of the United States Court of Appeals for the Fifth Circuit conflicts with decisions of other United States Courts of Appeals on the same question.

The conflict among the Circuits has been noted previously by the Chief Justice and one Associate Justice in their dissents to denial of writs of certiorari in *Greco v. Orange Memorial Hospital Corp.*, 423 U.S. 1000 (1975), and *Taylor v. St. Vincents Hospital*, 424 U.S. 948 (1976). The Appendix hereto contains a list of the conflicting decisions (and see pp. 12-13 and A-1,2, *infra*).

Congress has acknowledged the existence of the question here presented, but has expressly avoided it. By Section 401(b) of the Health Programs Extension Act of 1973, 87 Stat. 9 (set out at p. A-112, *post*), Congress prohibited the Federal courts from compelling a physician or hospital to perform or permit a sterilization or abortion. In its report on the measure, the House Committee on Interstate and Foreign Commerce noted the District Court's first ruling in *Taylor v. St. Vincents Hospital*, D. Mont. Civ. No. 1090 (Nov. 1972)[8] that, "the fact that the defendant is the beneficiary of Hill-Burton Act funds is alone sufficient to support an assumption of jurisdiction."[9] The House Committee declared, "In recommending the enactment of this provision, the Committee expresses no opinion as to the validity of the *Taylor* decision." H.R. Rep. No. 93-227, 93d Cong., 1st Sess.; 1973 U.S. Code & Cong. News at p. 1473.

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[8] The *Taylor* case was a suit to compel a hospital to allow a sterilization. Following enactment of §401(b), the District Court dismissed the case. 369 F. Supp. 948 (D. Mont. 1973), *aff'd*, 523 F.2d 75 (9th Cir. 1975), *cert. denied*, 424 U.S. 948 (1976).

[9] This quotation is taken from the Committee Report; the decision was not reported in F. Supp.

2. The question presented is one of National scope. It involves an important question as to which there is a need for a uniform rule in all the Circuits.

The Hill-Burton Act established an "integrated"[10] National health care system. As it often does, Congress authorized distribution of the funds to and through the States, but the purpose declared in Section 601 (42 U.S.C.A. § 291) and the result achieved are National in scope and jurisdiction.[11] Pursuant to the Hill-Burton legislation billions of dollars in Federal funds have been distributed to the States, and in turn disbursed by the States if approved by the Surgeon General, for construction of hospitals and other health care facilities in every corner of the Nation.

Yet under existing case law, the legal duties of Hill-Burton hospitals to their patients and staff physicians are subject to the geopolitical accident of the Federal Judicial Circuit in which a State is located. In the Fourth Circuit, Hill-Burton hospitals clearly are required to follow due process of law. *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963) (*en banc*), *cert. denied*, 376 U.S. 938 (1964). The rule in the First Circuit is the same, according to a District Court. *Bricker v. Sceva Speare Memorial Hospital*, 339 F. Supp. 234 (D.N.H.), *aff'd* sub nom. *Bricker v. Crane*, 468 F.2d 1228 (1st Cir. 1972). The rule is unclear in the Tenth, Sixth and Third Circuits. *Compare Don v. Okmulgee Memorial Hospital*, 443 F.2d 234, 237 (10th Cir. 1971), with *Ward v. St. Anthony Hospital*, 476 F.2d 671 (10th Cir. 1973); *compare Jackson v. Norton-Children's Hospitals, Inc.*, 487 F. 2d 502 (6th Cir. 1973), *cert. denied*, 416 U.S. 1000 (1974),

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[10] H.R. Rep. 2519, 79th Cong., 2d Sess.; 1946 U.S. Code & Cong. News 1561.

[11] S. Rep. 790, 81st Cong., 1st Sess.; 1949 U.S. Code & Cong. News 2193.

with *O'Neill v. Grayson County War Memorial Hospital*, 472 F.2d 1140 (6th Cir. 1973); *compare Hodge v. Paoli Memorial Hospital*, 433 F. Supp. 281 (E.D. Pa. 1977), with *Citta v. Delaware Valley Hospital*, 313 F. Supp. 301 (E.D. Pa. 1970). The other Circuits that have addressed the issue, except the Fifth, appear not to require Hill-Burton hospitals to adhere to due process of law. See cases cited in the opinion dissenting from the denial of *certiorari* in the *Greco* case, 423 U.S. 1000, —, 96 Sup. Ct. at 435, and the list at p. A-1, *post*.

In the Fifth Circuit, the test appears to be whether the hospital is *directly owned* by a unit of local government. To be eligible for Hill-Burton money, a hospital must be "public or other nonprofit" in ownership and operation. See Hill-Burton §§ 601(b) and 631(g).[12] The test applied in the Fifth Circuit, although easy to apply, creates the undesirable circumstance of demanding or not demanding due process on the basis of the State in which the physician lives. Contrast *Foster v. Mobile County Hospital*, 398 F.2d 227 (5th Cir. 1968) (Alabama case), and *Shaw v. Hospital Authority*, 507 F.2d 625 (5th Cir. 1975) (Georgia case), in which physicians were held entitled to due process of law, with the instant case. The provision of due process also can depend upon in which Texas county the hospital is located. Contrast *Sosa v. Board of Mgrs. of Val Verde Memorial Hospital*, 437 F.2d 1973 (5th Cir. 1971) (Val Verde County, Texas, due process required), with *Greco v. Orange Memorial Hospital*, 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975) (Orange County, Texas, due process not required). In Alabama and Georgia, "ownership" of Hill-Burton hospitals is committed by state law to special authorities. In Texas, the "owner's" nature apparently varies from one county hospital to another. There thus is no

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[12] "(g) the term 'non-profit hospital' means any hospital owned and operated by a corporation or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual."

uniform rule in the Fifth Circuit applicable to all Hill-Burton hospitals. Unfortunately for Petitioner, Hill-Burton hospitals in Florida are "owned" by tax-exempt, non-profit corporations.

Petitioner urged in the Court below that the *Sosa* and *Greco* cases are indistinguishable in principle. The line drawn between them in the case at bar surely is fine and tenuous, as well as producing an unacceptable result. This Court should grant certiorari to resolve the conflicting results within the Fifth Circuit and among the other Circuits. *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967).

3. The issue is presented here sharply. There are no shadows from *Doe v. Bolton*, 410 U.S. 179 (1973), or §401(b) of the Health Programs Extension Act of 1973 to obscure it. The facts of the Hill-Burton financing and other "state" involvement were found by the Trial Judge in his Order of January 22, 1975 (R. 1371 and commencing at page A-47, *post*) and are undisputed.

The issue involves basic civil rights for patients and physicians. A Florida citizen's right to an elective abortion becomes ephemeral if she cannot enforce it against a hospital built with her and other taxpayers' funds. A Florida physician who is a member of a minority group could be excluded from a Hill-Burton hospital's medical staff (which position does not include any employment relationship) for the most invidiously discriminatory reasons, but have no recourse in the United States Courts. And, as here, a physician can be barred from a publicly-financed Hill-Burton hospital without opportunity to vindicate his medical judgment and surgical procedure in a fair hearing held after due notice, even though it is the only place within 22 miles where he can engage in the practice of his profession.

The right to due process of law in a Hill-Burton hospital should not depend on the form of "ownership," a condition which is decreed by local legislation.

4. The question involved in this case has arisen with sufficient frequency to warrant this Court's attention. A list of all the cases of which counsel are aware is included in the Appendix. The context of the litigation has involved in each instance personal or property rights of such magnitude as to make it almost certain that the issue will continue to arise in the Courts of Appeals until this Court lays it to rest. Serious questions of Federal court jurisdiction merit this Court's resolution. *Cf., Bruner v. United States*, 343 U.S. 112 (1952).

CONCLUSION

The question raised by this petition involves enforcement in the United States Courts of the right to due process of law in a Federally-financed and State-sponsored hospital. The Courts of Appeals for the several Circuits have reached opposing conclusions. The issue arises frequently, and a National uniform rule of "Federal question" jurisdiction ought to be established by this Court. The facile solution of the Court of Appeals in the instant case allows the States to control access to the Federal Courts and must not be allowed to stand.

This petition for a writ of certiorari should be granted.

Respectfully submitted,

THEODORE M. FORBES, JR.
GAMBRELL, RUSSELL, KILLORIN & FORBES
4000 First National Bank Tower
Atlanta, Georgia 30303

WILLIAM H. GLEASON
P.O. Box 3266
Indialantic
Melbourne, Florida 32903
723-5121 (A.C. 305)

THORWALD J. HUSFELD
LANDIS, GRAHAM, FRENCH, HUSFELD, SHERMAN & FORD, P.A.
110 West Indiana Avenue
P.O. Box 329
DeLand, Florida 32720

Attorneys for Petitioner

APPENDIX

CASES INVOLVING FEDERAL JURISDICTION BASED ON HILL-BURTON FINANCING

Ascherman v. Presbyterian Hospital of Pacific Medical Center, Inc., 507 F.2d 1103 (9th Cir. 1974);

No Federal jurisdiction.

Barrett v. United Hospital, 376 F. Supp. 791 (S.D.N.Y. 1974);

No Federal jurisdiction.

Barrio v. McDonough District Hospital, 377 F. Supp. 317 (S.D. Ill. 1974);

No Federal jurisdiction.

Bricker v. Sceva Speare Memorial Hospital, 339 F. Supp. 234 (D.N.H.), *aff'd sub nom.* Bricker v. Crane, 468 F.2d 1228 (1st Cir. 1972);

Federal jurisdiction found.

Briscoe v. Bock, 540 F.2d 392 (8th Cir. 1976);

No Federal jurisdiction.

Chiaffitelli v. Dettmer Hospital, Inc., 437 F.2d 429 (6th Cir. 1971);

Federal jurisdiction found.

Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. 1974);

No Federal jurisdiction, by reason of § 401(b) of Health Programs Extension Act.

Christhilf v. Annapolis Emergency Hospital Ass'n, Inc., 496 F. 2d 174 (4th Cir. 1974);

Federal jurisdiction found.

Citta v. Delaware Valley Hospital, 313 F. Supp. 301 (E.D. Pa. 1970);

Federal jurisdiction found.

Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973);

No Federal jurisdiction.

Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638 (4th Cir. 1975);

Federal jurisdiction found.

Don v. Okmulgee Memorial Hospital, 443 F.2d 234 (10th Cir. 1971);

Federal jurisdiction found.

Eaton v. Board of Managers of James Walker Memorial Hospital, 261 F.2d 521 (4th Cir. 1958), *cert. denied*, 359 U.S. 984 (1959);

No Federal jurisdiction.

Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964);

Federal jurisdiction found.

Foster v. Mobile County Hospital Board, 398 F.2d 227 (5th Cir. 1968);

Federal jurisdiction found.

Greco v. Orange Memorial Hospital Corp., 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975);

No Federal jurisdiction.

Hodge v. Paoli Memorial Hospital, 433 F. Supp. 281 (E.D. Pa. 1977);

No Federal jurisdiction.

Hodgson v. Lawson, 542 F.2d 1350 (8th Cir. 1976);

No Federal jurisdiction.

Holton v. Crozer-Chester Medical Center, 419 F. Supp. 334 (E.D. Pa. 1976);

Jackson v. Norton-Children's Hospitals, Inc., 487 F.2d 502 (6th Cir. 1973);

No Federal jurisdiction.

Meredith v. Allen County War Memorial Hospital, 397 F.2d 33 (6th Cir. 1968);

Federal jurisdiction found.

Mulvihill v. Julia L. Butterfield Memorial Hospital, 329 F. Supp. 1020 (S.D.N.Y. 1971);

No Federal jurisdiction.

O'Neill v. Grayson County War Memorial Hospital, 472 F.2d 1140 (6th Cir. 1973);

Federal jurisdiction found.

Place v. Shepherd, 446 F.2d 1239 (6th Cir. 1971);

No Federal jurisdiction.

Poe v. Charlotte Memorial Hospital, Inc., 374 F. Supp. 1302 (W.D.N.C. 1974);

Federal jurisdiction found.

Pollock v. Methodist Hospital, 392 F. Supp. 393 (E.D. La. 1975);

Federal jurisdiction found.

Sams v. Ohio Valley Gen'l Hospital Ass'n, 413 F.2d 826 (4th Cir. 1969);

Federal jurisdiction found.

Shaw v. Hospital Authority of Cobb County, 507 F.2d 625 (5th Cir. 1975);

Federal jurisdiction found.

Shulman v. Washington Hospital Center, 222 F. Supp. 59 (D.D.C. 1963), *remanded with directions*, 348 F.2d 70 (D.C. Cir. 1965);

No Federal jurisdiction.

Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963) (*en banc*), *cert. denied*, 376 U.S. 938 (1964);

Federal jurisdiction found.

Slavcoff v. Harrisburg Polyclinic Hospital, 375 F. Supp. 999 (M.D. Pa. 1974);

No Federal jurisdiction.

Sosa v. Board of Managers of Val Verde Memorial Hospital, 437 F.2d 173 (5th Cir. 1971);

Federal jurisdiction found.

Taylor v. St. Vincent's Hospital, 523 F.2d 75 (9th Cir. 1975), *cert. denied*, 424 U.S. 948 (1976);

No Federal jurisdiction, by reason of § 401(b) of Health Programs Extension Act.

Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973);

No Federal jurisdiction.

Watkins v. Mercy Medical Center, 520 F.2d 894 (9th Cir. 1975);

No Federal jurisdiction.

United States District Court
Middle District of Florida
Orlando Division

Dr. John G. Madry, Jr.,
Plaintiff,
vs.
Dr. Otto G. Sorel, et al.,
Defendants.

Case No.
69-136-Orl-Civ-Y

ORDER

This cause came before the Court on several motions *viz.*, the motion to dismiss upon suggestion of defendant Brevard Hospital Association, Inc., that the Court lacks jurisdiction of the subject matter; plaintiff's motion to set aside the order adopting the alternative plan; plaintiff's motion to disqualify the members of the ad hoc committee; motion to dismiss of defendants Blackburn and McMillan; the motion to dismiss of defendant Holmes; and the motion to dismiss of Dr. Edith Mangone. Immediately prior to the hearing, plaintiff had filed an additional motion to amend the second amended complaint by adding a fourth count based on alleged violations of the antitrust laws.

The motion to dismiss on jurisdictional grounds filed by defendant Brevard Hospital Association, Inc., and the conclusion drawn by this Court from the principal authority cited in that defendant's memorandum, *Greco v. Orange Memorial Hospital Corp.*, 513 F.2d 873 (5th Cir. 1975), *cert. denied*, 44 L.W. 3328, make unnecessary consideration of any other motions except plaintiff's motion to amend his complaint.

In orders of July 15, 1971 and January 22, 1975, this Court had previously held that requisite state action existed for maintenance of the suit. The law, however, is neither rigid nor unchanging. This Court's prior decisions were primarily based upon *Sosa v. Board of Managers of Val Verde Memorial Hospital*, 437 F.2d 173 (5th Cir. 1971). That decision has been overruled by implication in *Greco vs. Orange Memorial Hospital Corp., supra. Greco* represents a distinct narrowing in the concept of state action. Not only do the facts alleged in this case indicate a level of involvement by the state much below that in *Greco*, there is no allegation whatsoever that the state was involved at all in the action complained of, the revocation of Dr. Madry's right to practice within the hospital. *Greco, supra*, at 875, 881. Moreover, the Court in *Greco* pointed out that the origin of the expanded concept of state action foreshadowed in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 6 L.Ed.2d 45 (1961), was the desire to eradicate unconstitutional racial discrimination. The difficulties engendered by this expansion of the state action concept when applied to areas unaffected by racial discrimination are still being unraveled by the Courts, see, *Greco, supra*, at 879-880; but at the present stage of that process, the scrutiny given claims with a racial or religious tinge must be greater than those resting on due process alone. *Golden vs. Biscayne Bay Yacht Club*, 521 F.2d 344 (5th Cir. 1975). Under the present state of the law, then, this Court concludes that it does not have jurisdiction and this cause must be dismissed. The dismissal, of course, must operate as to all defendants since state action is necessary under 42 U.S.C. §1981, *et seq.* to provide the jurisdictional basis.

As to the motion to amend the second amended complaint by adding a fourth count alleging antitrust violations, it is the opinion of the Court that such an amendment simply comes too late, that is, some six and one half years after the inception of the suit. Additionally, even if this Court were to allow this

suit to be kept alive by the proposed amendment, a single, isolated instance of the denial of hospital privileges to one doctor would not state a claim for which relief may be granted under the Sherman Act. See, *Sokol v. University Hospital, Inc.*, 402 F. Supp. 1029 (D. Mass. 1975). Accordingly, it is

ORDERED that the motion of defendant Brevard Hospital Association, Inc., to dismiss for want of subject matter jurisdiction, be and is hereby granted; it is further

ORDERED that the motion of plaintiff to amend his second amended complaint be and is hereby denied; and it is further

ORDERED that this cause be and is hereby dismissed as to all defendants.

DONE AND ORDERED in Chambers at Orlando, Florida, this 16th day of February, 1976.

/s/ GEORGE C. YOUNG
Chief Judge

Copies to:

Thorwald J. Husfield [*sic*], Esquire
Post Office Box 329
Deland, Florida 32720

J. Compton French, Esquire
Post Office Box 5357
Daytona Beach, Florida 32020

William H. Gleason, Esquire
Post Office Box 3266
Indialantic, Florida 32903

Theodore M. Forbes, Jr., Esquire
4000 First National Bank Tower
Atlanta, Georgia 30303

Elting L. Storms, Esquire
Post Office Box 1376
Melbourne, Florida 32901

Ralph Geilich, Esquire
Post Office Box 820
Melbourne, Florida 32901

G. W. Hedman, Esquire
1103 Hibiscus Boulevard
Melbourne, Florida 32901

Marks, Gray, Yates, Conroy & Gibbs
Post Office Box 447
Jacksonville, Florida 32202

Pierce [sic] Wood, Esquire
542 Hammock Road
Melbourne, Florida 32901

Dr. John G. Madry, Jr.,
Plaintiff-Appellant

v.

Dr. Otto G. Sorel, et al.,
Defendants-Appellees

No. 76-1495

United States Court of Appeals, Fifth Circuit

Aug. 29, 1977

Appeal from the United States District Court for the Middle District of Florida.

Before Thornberry, Godbold and Fay, Circuit Judges.

Fay, Circuit Judge:

The plaintiff-appellant, Dr. John G. Madry, Jr., joined the staff of Brevard Hospital on January 1, 1961. In May of 1966, Dr. Madry was "permanently suspended" from staff privileges by the Board of Governors of the hospital after a series of alleged violations of hospital rules—the last of which was the sterilization of a county welfare patient apparently without her written consent. Dr. Madry filed this action on June 27, 1969 claiming he had been denied the due process of law guaranteed by the Fourteenth Amendment when he was discharged from the medical staff without notice or a hearing. Doctor Madry sought a declaratory judgment, a permanent injunction, reinstatement to the hospital medical staff, and damages in excess of $1,000,000. After protracted litigation, the district court on February 17, 1976 dismissed this case for lack of federal jurisdiction. The principle [*sic*] issue to be decided on appeal is

whether actions by a private, non-profit hospital which admittedly has received some financial assistance from federal and local governments should be considered "state action" as that term is used in the context of the Fourteenth Amendment. We agree with the district court, and hold that the actions of Brevard Hospital do not equal state action, and, consequently, the district court lacked jurisdiction to hear this case.

In order to set forth a cause of action under the Fourteenth Amendment, it is necessary to allege that one's constitutional rights were infringed upon as a result of "state action" since the Fourteenth Amendment does not prevent invidious discrimination by private parties. Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883). The inquiry which must be made in this case, therefore, is whether there is a sufficiently close nexus between the state and the Brevard Hospital so that the actions of the latter may be fairly treated as that of the state itself. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974).

Twice before this Court has had the opportunity to examine exactly what state action significance to attach to the various activities of public and private hospitals. *See Greco v. Orange Memorial Hospital Corp.*, 513 F.2d 873 (5th Cir. 1975), and *Sosa v. Board of Managers of Val Verde Memorial Hospital*, 437 F.2d 173 (5th Cir. 1971). In *Sosa*, a doctor was challenging his denial of admission to the medical staff of Val Verde Memorial Hospital. Val Verde Memorial Hospital was a county hospital established pursuant to Texas law. *See* Vernon's Ann.Tex.Rev.Civ.Stat. arts. 4478 to 4494r-3. The hospital was constructed and maintained with county funds supplemented by federal aid under the Hill-Burton Act, 42 U.S.C. § 291 *et seq*. The governing board of Val Verde was appointed by the County Commissioners of Val Verde County. This court held that the Val Verde Memorial Hospital was a public body receiving both state and federal funds and, therefore, the acts of the hospital were state acts which must comport with the Fourteenth Amend-

ment. In *Greco*, a different situation was presented. Dr. Greco was challenging a policy adopted by the hospital's board of directors preventing further use of the hospital's facilities for the performance for non-therapeutic abortions. This court held that the actions of the Orange Memorial Corporation, a private, non-profit, tax exempt corporation, did not equal "state action". This result was reached even though the hospital was built with federal and county funds, and was leased to the corporation for the nominal sum of $1 per year. The holding rested upon the fact that the local and federal governments had little to do with the actual running of the hospital. The corporation consisted of life and advisory members from which a board of directors was elected. The board of directors was the ultimate authority in determining hospital policy and acted independent of any influence from Orange County. In fact, the lease between Orange County and the hospital explicitly provided that the *lessee* would prescribe the terms and regulations of medical care given in the facility. Given this factual setting, this Court held:

> In summary, we find that Orange County is not sufficiently connected with the Orange Memorial Hospital Corporation's activities to imbue those actions with the attributes of the state. The involvement of the County is not sufficiently related to the corporation's decision to prohibit elective abortions to justify the imposition of Constitutional restrictions upon the daily business of the hospital. Absent a charge of racial discrimination we are disinclined to press the state action doctrine and all that it entails into the internal affairs of a hospital. Moreover we do not perceive Orange Memorial Hospital as an entity exercising peculiarly governmental functions which might, in the absence of constitutional restrictions, be employed in derogation of a citizen's fundamental rights.

Greco v. Orange Memorial Hospital, 513 F.2d 873, 882 (5th Cir. 1975).

The plaintiff contends that our holdings in *Sosa* and *Greco* are inconsistent. We do not agree. The Val Verde Memorial Hospital was a hospital owned and operated by the county. The policy decisions of the hospital were made by a board which consisted of members appointed by the Val Verde County Commission. On the other hand, Orange Memorial Hospital was a private hospital which was operated by a board which was independent of Orange County. The sole fact that the hospital had received a significant amount of local and federal funding was not sufficient to subject the acts of the hospital to the restraints of the Fourteenth Amendment.

Given this legal background, it readily becomes apparent that the case before us is controlled by our decision in *Greco* and that the actions of the Brevard Hospital do not have to fall within the parameters of the Fourteenth Amendment. Brevard Hospital is a private, non-profit, tax exempt hospital. While it is true that the land upon which the hospital was built was purchased from the city of Melbourne, Florida for a nominal price, the hospital itself was paid for with funds received from a public fund-raising drive and through the use of federal Hill-Burton funds. All additions to the Brevard Hospital have been paid for primarily with donations from the public, Hill-Burton funds, and a mortgage loan from a savings and loan association. The hospital itself admits that it has received financial support from the local and federal governments, but the hospital correctly asserts that the receipt of financial assistance, in and of itself, is not a sufficient nexus to make the acts of the hospital equal the acts of the state.

Dr. Madry attempts to distinguish his case from *Greco*, and to establish the requisite state action, by pointing out that the Brevard Hospital's by-laws allowed two Brevard County Commissioners and the mayors of nine Brevard County municipalities to serve as *ex officio* members of the Board of Governors of the hospital. The plaintiff contends that this fact likens his

situation to the situation found in *Sosa* in which the local government actually played a policy-making role in the running of the Val Verde Hospital. We disagree. Dr. Madry seems to overlook the actual manner in which the Brevard Hospital functions. In addition to the *ex officio* members the Board of Governors was composed of twelve persons who were elected from the membership of the hospital corporation. There was evidence before the Court that no *ex officio* member had ever participated as a member of the Board, and that the Board acted independent of the City of Melbourne and Brevard County. In actuality, *ex officio* status was most likely granted the holders of the various political offices as an attempt to improve the hospital's public relations. But, regardless of the reasons for granting the *ex officio* status, there was in fact insufficient public control over the running of the hospital to render the actions of the hospital that of the state. The *ex officio* members of the Board served (and we use the word "serve" in its loosest sense) at the grace of the private corporation, and they could be removed by a by-law amendment of the corporation without the consent of the Florida Legislature, the Brevard County Commissioners or the officials of the various Brevard County municipalities. This step was in fact taken some time after the dismissal of Dr. Madry, so that presently there are no public officials serving as *ex officio* members of the Board. Also, the plaintiff has brought before us no evidence whatsoever which indicates that any public official, at any time, actually participated as a member of the Board of Governors. There is evidence in the record that no *ex officio* member had ever attended a hospital board meeting.[1] Our decision in this case might be very different if there was some indication that the *ex officio* members had some purpose other than a ceremonial one, and that they actually participated to some extent in the running

[1] The affidavit of the hospital administrator (App. p. 648) clearly indicates that the municipal and county officials never participated as members of the Board and had never attended a board meeting since October, 1952, the date of the administrator's employment.

of the hospital. Absent such an allegation by the plaintiff, we are not willing to confine the actions of an otherwise private hospital to the restraints of the Fourteenth Amendment.

Dr. Madry raises one other error on appeal.[2] He contends that the trial judge erred in denying his motion of January 22, 1976 to amend his complaint in order to add a new count based on a violation of the Federal Anti-Trust laws. Dr. Madry admits that he filed this motion largely because he anticipated the dismissal of his case for lack of jurisdiction, and because he realized that the statute of limitations had long since run on this cause of action insofar as a new suit was concerned. We hold that the trial judge did not abuse his discretion in denying the plaintiff's motions. The proposed amendment was proffered almost seven years after this litigation had begun, and after the court had twice before granted the plaintiff leave to amend his complaint. If untimeliness is ever a justification for denying a motion to amend, this is the case. Consequently, the judgment of the district court is Affirmed in all respects.

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[2] The appellant did raise a third error on appeal regarding the trial judge's failure to grant his motions to set aside the then pending "plan" to afford plaintiff a due process hearing, and to disqualify for bias certain members of the panel who were to serve as the forum for that hearing. These points, however, were rendered moot by our decision that the trial court lacked jurisdiction over the case.

United States Court of Appeals
for the Fifth Circuit

No. 76-1495

D.C. Docket No. 69-136-Orl-Civ-Y

Dr. John G. Madry, Jr.,

Plaintiff-Appellant,

versus

Dr. Otto G. Sorel, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the
Middle District of Florida

Before THORNBERRY, GODBOLD and FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

August 29, 1977

Issued as Mandate: Oct. 11, 1977

United States Court of Appeals
Fifth Circuit
Office of the Clerk

September 30, 1977

Edward W. Wadsworth
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

To All Parties Listed Below:

No. 76-1495—Dr. John G. Madry, Jr. v. Dr. Otto G. Sorel, et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
Clerk
By BRENDA M. HAUCK
Deputy Clerk

** on behalf of appellant, Dr. John G. Madry, Jr.,

cc: Mr. Theodore M. Forbes, Jr.
Mr. William H. Gleason
Mr. Thorwald J. Husfeld
Messrs. Ralph Geilich
Elting L. Storms
Mr. James Rinamon
Mr. Peirce Wood

John C. GRECO, Plaintiff-Appellant,

v.

ORANGE MEMORIAL HOSPITAL CORPORATION et al.,
Defendants-Appellees.

No. 74-2102.

United States Court of Appeals,
Fifth Circuit.

May 29, 1975.

Rehearing and Rehearing En Banc

Denied June 26, 1975.

Physician brought an action for a judgment declaring that a hospital policy prohibiting performance of elective abortions was unconstitutional. The United States District Court for the Eastern District of Texas, William M. Steger, J., dismissed, 374 F. Supp. 227, and physician appealed. The Court of Appeals, Gewin, Circuit Judge, held that the physician had standing to sue; and that where the board of directors of the private hospital, which operated on a premises leased from a county, had exclusive control of the hospital's medical policy, neither the county nor state had sought to regulate or influence said policy and in particular had remained neutral with respect to the performance of elective abortions, there was no "state action" involved in the policy and thus, district court lacked jurisdiction under the Civil Rights Act of 1871.

Affirmed.

Clark, Circuit Judge, filed concurring opinion.

1. Declaratory Judgment Key 300

Physician who sought declaratory judgment that hospital's policy prohibiting performance of elective abortions was unconstitutional had standing to sue based on his individual economic interest, on his right to practice medicine free from the imposition of arbitrary restraints and on the right to privacy of patients seeking abortions.

2. Civil Rights Key 13.5(2)
Constitutional Law Key 254

Federal financial assistance does not constitute "state action" and bring otherwise private facility within parameters of Civil Rights Act of 1871 and Fourteenth Amendment. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

3. Civil Rights Key 13.5(4)
Constitutional Law Key 254

Private hospital is subject to provisions of Civil Rights Act of 1871 and Fourteenth Amendment only if its activities are significantly affected with state involvement. 42 U.S.C.A. § 1983; U.S.C. A.Const. Amend. 14.

4. Civil Rights Key 13.13(1)

Deprivation of constitutional rights by defendant acting under color of state law must be proved in order to recover under Civil Rights Act of 1871. 42 U.S.C.A. § 1983.

5. Civil Rights Key 13.5(2)

Generally, "state action" and "under color of law" are perceived as alternative ways of expressing same legal principle. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

6. Courts Key 284(4)

Where board of directors of private hospital, which operated on premises leased from county, had exclusive control of medical policy, neither county nor state had sought to regulate or influence medical policy and in particular had remained neutral with respect to performance or nonperformance of elective abortions, there was no "state action" involved in policy and federal court was without jurisdiction under Civil Rights Act of 1871. 42 U.S.C.A. § 1983; U.S.C.A.Const. Amend. 14.

James R. Weddington, Austin, Tex., for plaintiff-appellant.

John D. Rienstra, Beaumont, Tex., L. W. Anderson, Dallas, Tex., Thomas B. Weatherly, Frank C. Gibbs, Houston, Tex., Richard N. Evans, Beaumont, Tex., Bill Sexton, Orange, Tex., Cleve Bachman, Lipscomb Norvell, Jr., Beaumont, Tex., Frank W. Hustmyre, Orange, Tex., for defendants-appellees.

Don Burgess, Jim Sharon Bearden, Orange, Tex., for County Commissioner.

Appeal from the United States District Court for the Eastern District of Texas.

Before Gewin, Bell and Clark, Circuit Judges.

Gewin, Circuit Judge:

The plaintiff-appellant, Dr. John C. Greco, a licensed physician authorized to practice obstetrics and gynecology, joined the staff of the Orange Memorial Hospital in 1960. In early 1973 after the United States Supreme Court invalidated the Texas criminal abortion statute, the appellant began to perform elective abortions. Eight elective abortions were performed by Dr. Greco in Orange Memorial Hospital before the hospital's board of directors adopted a motion of the medical staff to prevent further use of the hospital's facilities for the performance of non-therapeutic abortions. Following the institution of this policy six of Dr. Greco's patients who desired non-therapeutic abortions were denied admission to the hospital.

Facts stipulated by the parties indicate that surgical procedures technically indistinguishable from elective abortions are performed in Orange Memorial Hospital and that the hospital's facilities are adequate to accommodate patients seeking elective abortions. Dr. Greco filed suit against the Orange Memorial Hospital Corporation, its board of directors and medical staff, and the Commissioners Court of Orange County, seeking declaratory and injunctive relief, as well as damages, for their allegedly unconstitutional policy. Prior to trial the district court ordered the damage claim severed and held in abeyance pending resolution of the other issues presented. The court found the board of directors ultimately responsible for hospital policy and dismissed the medical staff from the case. Subsequent to the presentation of Dr. Greco's evidence the court dismissed the remaining defendants holding that absent a showing of "state action" the court was without the subject matter jurisdiction required by 42 U.S.C. § 1983 and the Fourteenth Amendment to hear the case.[1] We agree with the district court in all respects and affirm. The opinion of the district court is reported in 374 F.Supp. 227 (E.D.Tex.1974).

[1] See, Parish v. National Collegiate Athletic Association, 506 F.2d 1028, 1031 (5th Cir. 1975).

Dr. Greco raises two questions on appeal: (1) whether the district court erroneously decided that the actions of the hospital staff and the board of directors did not constitute "state action", or "action under color of law"; (2) whether the district court erroneously dismissed the cause of action against the medical staff. The appellees present a cross specification of error contending that the district court erroneously found that Dr. Greco had standing to bring the suit.

[1] Addressing first the question of standing, we find that in the circumstances Dr. Greco had standing to litigate on behalf of his patients who were allegedy deprived of constitutional rights by the Orange Memorial Hospital's restrictive abortion policy, and on his own behalf because of his individual economic and liberty interest. Dr. Greco's personal stake in this litigation is primarily his right to practice medicine free from the imposition of arbitrary restraints, and the physician's interest in the context of this case is inextricably bound up with the right to privacy of the patients seeking an abortion. The existence of such a personal interest in the controversy is assurance enough of the adversarial character of the litigation necessary to sharply focus the issues for this court.[2] See Nyberg v. City of Virginia, 495 F.2d 1342, 1344 (8th Cir. 1974); Shaw v. Hospital Authority of Cobb County, 507 F.2d 625 (5th Cir. 1975); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); YWCA v. Kugler, 342 F.Supp. 1048, 1055 (D.N.J. 1972).

[2] The district court stated its conclusion on the issue of standing as follows:

> This Court is in agreement with the reasoning of the Court in Young Women's Christian Association of Princeton, N. J. v. Kugler, that the plaintiff physician has standing to litigate any deprivations of the constitutional rights of his pregnant women patients. Further, he has standing to litigate on his own behalf because he has suffered some, albeit small, economic loss and because the hospital rule may infringe on his right to practice medicine.

374 F.Supp. at 232.

See generally, Standing to Assert Constitutional Jus Tertii, 88 Harv.L.Rev. 423 (1974).

The difficult questions on this appeal are those presented by Dr. Greco. He asserts essentially that Orange Memorial Hospital and Orange County are engaged in a symbiotic relationship, that Orange County has delegated its authority to the hospital corporation, and that the hospital is performing a public function, all of which indicate that the hospital should be subject to constitutional restrictions. Dr. Greco takes specific issue with the district court's construction of Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972) and Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973) to the effect that he must show that Orange County is involved in the very activity challenged in order to prove "state action." He argues that the evidence shows the state to be a joint participant in the operation of the private entity and that the state is perforce involved in the challenged activity.

In order to provide the proper perspective for addressing these questions we must delve more deeply into the factual background of the Orange Memorial Hospital and, once ascertained, perceive the facts of this case in the context of the legal morass of the ever evolving state action doctrine.

This history of the hospital's creation was stipulated by the parties. In 1954 land on which the hospital is located was donated to Orange County by private individuals. In the same year county voters authorized the issuance of $1,762,000.00 in hospital bonds. The local money was combined with a Hill-Burton grant of $1,250,000.00 in order to erect the original hospital building. In later years more land was donated to the county by private individuals and the county commissioners, without the explicit approval of the voters, issued approximately $670,000.00 worth of hospital time warrants so that additions could be made to the original building. The county owns both

the land and the building which houses the Orange Memorial Hospital. Orange County citizens pay eight and one-half cents of every tax dollar to retire the bonds and time warrants.

[2] In 1957 Orange Memorial Hospital under the auspices of the non-profit hospital corporation, opened its doors to the public. Daily operating expenses are assumed by the hospital corporation and paid with funds generated by the hospital's services. To-date income from patients has been sufficient to defray all expenses. The corporation leases the land and hospital building from the county for one dollar per year and is exempt from all taxation, state, local, and federal. The term of the lease between the county and the hospital corporation is for a period of 5 years, and the lease may be renewed for 5 year terms indefinitely. Under the provisions of the lease the hospital corporation agreed to the following: (1) to operate the hospital as a non-profit institution and to furnish to the general public medical and surgical care subject to such terms and regulations as the lessee may prescribe; (2) to carry out the assurances required of the lessor in order to obtain federal funds and to relinquish possession of the hospital in the event it fails to adequately comply;[3] (3) to have all equipment and supplies inventoried, in a manner approved by lessor, and to dispose of worthless, damaged, or worn out equipment only with the prior approval of the Commissioners Court; (4) to be responsible for

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[3] The Hospital Survey and Construction Act (Public Law 725, 79th Congress) Tit. 42 U.S.C.A. § 291 et seq. provides generally for conditions upon which federal assistance is available for the construction of hospitals. For example, § 291e requires that laborers engaged in construction of the facility be paid wages not less than those prevailing on similar work in the particular locality. No condition is imposed with respect to the performance or non-performance of elective abortions.

Federal financial assistance does not bring an otherwise private facility within the parameters of 42 U.S.C. § 1983 and the Fourteenth Amendment. See, e. g., Barrett v. United Hospital, 376 F.Supp. 791, 800-01 (S.D.N.Y. 1974).

the expense of the day to day operation and maintenance of the hospital; (5) to make additions to the hospital with the written consent of lessor and at its own expense; (6) to keep all appropriate insurance in effect; (7) to submit an annual audit to lessor and to furnish any information which lessor feels is necessary to inform the people of Orange County about the operation and financial condition of the institution; (8) to accept indigent patients certified by the lessor subject to the prior obligation to receive emergency cases. The lessee is given an option to purchase the hospital during the term of the lease and an unlimited option to renew the lease for additional 5 year periods as indicated earlier. The lessor reserves the right through its County Health Office to advise the lessee that an indigent is being kept in the hospital for a longer period of time than neceessary, and that the lessor shall no longer be liable for expenses. The lessor-county specifically indicates in the lease that the lessee "has undertaken to relieve lessor of the responsibility and expense of operating a hospital."

The lessee-Orange Memorial Hospital Corporation was chartered as a non-profit, tax exempt, private corporation for the purpose of supporting charitable and educational undertakings including the operation and maintenance of the hospital, and the general promotion of the health of the community. The corporation consists of life and advisory members. Life membership is obtained by contributing $1000.00 to the corporation. Any citizen and qualified voter of Orange County who owns taxable property may become an advisory member by attending the annual meetings of the corporation. The direction and management of the affairs of the corporation is vested in the board of directors composed of 9 persons. Five members of the board must be life members and four members are elected from the advisory group. The by-laws of the corporation do not precisely define the relationship between the board of directors and the medical staff but do indicate that the board is the ultimate authority in determining hospital policy. The board is

authorized to receive and consider recommendations of the medical staff.[4]

[3-5] The district court correctly held that a private hospital is subject to the provisions of 42 U.S.C. § 1983[5] and the Four-

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[4] For example, Article IX §§ 1, 2, 9 of the Hospital Corporation's By-Laws provide that:

SECTION 1

> The Board of Directors shall appoint a Medical Staff of the Orange Memorial Hospital Corporation which shall, subject to the approval of the Board of Directors of the Corporation, adopt its own By-Laws. Such By-Laws shall not be inconsistent with the By-Laws of the Corporation, and shall include a provision for review of decisions concerning qualifications and privileges of members of the Medical Staff and applicants for membership, including the right of the individual practitioner to be heard upon request, at each step of the process.

SECTION 2

> The Medical Staff shall have the authority to evaluate the professional competence of staff members, and applicants for staff membership; and shall be responsible for making appropriate recommendations to the Board of Directors concerning the appointment, reappointment, granting of privileges, and curtailment of privileges of members, and as appropriate, applicants for membership on the professional staff.

SECTION 9

> The Board of Directors shall be kept informed of the recommendations generated from the Medical Staff's peer review of the clinical practice, and utilization review functions. The Chief of the Medical Staff shall be requested periodically (at regularly scheduled meetings of the Board of Directors) to provide the Board with a verbal briefing concerning these functions.

[5] The Civil Rights Act of 1871 (42 U.S.C.A. § 1983) states in pertinent part:

> Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable . . . in an action at law, suit in equity . . . .

teenth Amendment[6] only if its activities are significantly affected with state involvement.[7] Section 1983 and the Fourteenth Amendment do not preclude invidious discrimination by private parties. Civil Rights Cases, 109 U.S. 3, 11, 3 S.Ct. 18, 21, 27 L.Ed. 835, 841 (1883).[8] The problem in state action cases is that demarcation of the spheres, public and private, is a dynamic process, and the boundaries between the two shift and are adumbrated by the various factual situations which are presented for review.[9] As the Court in Burton v. Wilmington Parking Authority said, "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[10] It is enlightening, however, to consult the substantial body of "state action" case law for illustrations of the kind and degree of state involvement which justify the imposition of Constitutional restraints upon an ostensibly private entity.

Generally speaking, questions of "state action" arise when the state has involved itself in the activity under scrutiny or

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[6] Section 1 of the Fourteenth Amendment states in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[7] Two elements must be proved in order to recover under § 1983: (1) deprivation of a constitutional right by a defendant, (2) acting under color of law. See Smith v. Young Men's Christian Ass'n of Montgomery, 462 F.2d 634, 647 (5th Cir. 1972); Hathaway v. Worcester City Hospital, 475 F.2d 701, 705 (1st Cir. 1973), and discussion of Dr. Greco's standing to bring this suit, in text, *supra*. Generally speaking the labels "state action" and "under color of law" are perceived as alternative ways of expressing the same legal principle. Note, State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 Col. L. Rev. 656, n. 4 (1974) (hereinafter cited as State Action: Theories); Parish v. National Collegiate Athletic Association, 506 F.2d 1028, 1031 n. 6 (5th Cir. 1975). Justice Brennan is of the view that "under color of law" is more restrictive than the concept of "state action." Adickes v. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142, 184-85 (1970) (opinion of Brennan, J.).

[8] The Civil Rights Cases not only articulate the dichotomy between state and private action, but also illustrate the confusion which sometimes arises in the analysis of state action problems regarding the question of Congressional power to legislate against private discriminatory conduct. See generally, State Action, Congressional Power and Creditors' Rights: Burke and Reber An Essay on the Fourteenth Amendment, 46 Cal.L.Rev. 1005, 1011 (1973) (hereinafter cited State Action, Congressional Power and Creditors' Rights). For examples of decisions discussing the scope of Congressional power see, Griffin v. Breckenridge, 403 U.S. 88, 95 S.Ct. 1790, 29 L.Ed.2d 338 (1971); United States v. Guest, 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966).

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[9] See, e. g., James v. Pinnix, 495 F.2d 206, 209 (5th Cir. 1974); Wimbish v. Pinellas Co., Fla., 342 F.2d 804 (5th Cir. 1965). *Compare* Doe v. Bellin Mem. Hosp., 479 F.2d 756 (7th Cir. 1973) *with* Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974). See generally, State Action: Theories at 656-57.

The concepts of state action developed primarily in cases involving racial discrimination. The broad pronouncements articulated by the courts in some of these decisions are in the process of being more precisely defined, particularly in litigation free from racial overtones. See, e. g., Jackson v. Metropolitan Edison Co., — U.S. —, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974); James v. Pinnix, 495 F.2d 206, 209 (5th Cir. 1974) ("Some state involvement in the *Reitman-Moose Lodge* sense may be present here but it is simply not enough, given the nonracial nature of the case, to constitute state action."). See also, Black, The Supreme Court, 1966 Term; Foreword: "State Action", Equal Protection and California's Proposition 14, 81 Harv. L.R. 69, 70 (1967) (hereinafter cited as Supreme Court 1966 Term); State Action, Congressional Power and Creditors' Rights. *Compare*, The Reemergence of the "State Action" Requirement in Race Relations Cases, 22 Cath.U.L.R. 39 (1972).

[10] 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45, 50 (1961).

> Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an "impossible task" which "This Court has never attempted."

Id. (citation omitted).

when a private entity has of its own volition assumed a state or public function. See generally, State Action: Theories; State Action, Congressional Power and Creditors' Rights; State Action and the Burger Court, 60 Va.L.Rev. 840 (1974); Case Note, 43 Fordham L.Rev. 288 (1974); The Reemergence of the "State Action" Requirement in Race Relations Cases, 22 Cath.U.L.R. 39 (1972); Developments in the Law: Academic Freedom, 81 Harv.L.Rev. 1045, 1056-64 (1968). A state's involvement may be manifested in multifarious ways. For example, the state may sanction or seek to enforce the claims of private parties,[11] may give financial assistance to private institutions,[12] may regulate the activities of private organizations,[13] or may employ private parties to promote state interests.[14] On the other hand, the state may not be involved at all. A private party may assume a governmental character by participating in activities such as those described in Terry v. Adams[15] or Marsh v. Alabama.[16] The instant appeal involves some aspects of both state involvement and the assumption of a public function by private parties. Under neither approach do we feel that the circumstances warrant imposition of constitutional restrictions upon Orange Memorial Hospital.

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[11] See, e. g., Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); Reitman v. Mulkey, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967); Brantley v. Union Bk. & Trust Co., 498 F.2d 365 (5th Cir. 1974).

[12] See, e. g., Smith v. YMCA, 462 F.2d 634 (5th Cir. 1972); Hammond v. University of Tampa, 344 F.2d 951 (5th Cir. 1965); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973).

[13] See, e. g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973).

[14] See, e. g., Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956).

[15] 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953).

[16] 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946).

[6] Orange County gives the hospital corporation financial support to the extent that a publically owned building and the land upon which it is situated are leased for the nominal sum of one dollar per year. The hospital corporation is a non-profit, charitable, tax exempt, organization explicitly dedicated to maintaining the facility and to promoting community health care. Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961) involved a somewhat similar but not identical situation. The Authority, in order to make bond financing of its parking facility practicable by ensuring income in addition to parking fees, entered into long term leases with commercial tenants, including the Eagle Coffee Shoppe. The Eagle Coffee Shoppe, at its own behest, adopted a policy of racial discrimination, refusing to serve blacks. The Court emphasizing the facts that the parking facility was publically owned, that the restaurant's premises constituted physically and financially integral parts of the State's parking project, that upkeep and maintenance of the building were public responsibilities, that the lease provisions enabled the State to demand that Eagle provide non-discriminatory service, and that the restaurant was located in a building devoted to public purposes, found a degree of state participation in the Eagle's discriminatory action which was precluded by the Fourteenth Amendment.[17] The Court observed that the mutually beneficial relationship between the Authority and Eagle infused the respective projects with attributes of a joint venture.[18] Absent close scrutiny one might argue that Burton v. Wilmington Parking Authority controls the instant appeal. There are, however, significant differences in the two sets of circumstances.

The most obvious distinguishing factor is that Orange Memorial Hospital is not accused of racial discrimination. The

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[17] Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45, 51-2 (1961).

[18] *Id.*

doctrine of state action developed primarily in the area of racial discrimination. See State-Action Theories at 657 and footnote 10, *supra*. The concepts developed in this area, explicitly supported by constitutional and legislative mandates, were necessarily broadly drawn in order to implement Congressional intent in circumstances of positive and frequent state obfuscation and delay. The potentially explosive impact of the application of state action concepts designed to ferret out racially discriminatory policies in areas unaffected by racial considerations has led courts to define more precisely the applicability of the state action doctrine. See James v. Pinnix, 495 F.2d 206, 209 (5th Cir. 1974) and footnote 10, *supra*. See also Brantley v. Union Bk. & Trust Co., 498 F.2d 365 (5th Cir. 1974); Calderon v. United Furniture Co., 505 F.2d 950 (5th Cir. 1974); Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956); Blouin v. Loyola, 506 F.2d 20 (5th Cir. 1975); Grafton v. Brooklyn Law School, 478 F.2d 1137, 1142 (2nd Cir. 1973). *Compare*, Simkins v. Moses H. Cone Mem. Hosp., 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938, 84 S.Ct. 793, 11 L.Ed.2d 659 (1964). The policy of the Orange Memorial Hospital Corporation does not impinge upon the rights of a racial group seeking admittance and treatment, but rather affects primarily only the internal affairs of the facility. A secondary effect of the corporation's policy is admittedly to discriminate against persons seeking to obtain and physicians desiring to perform elective abortions. We feel, however, that the interest of the hospital in ordering its internal administrative affairs outweighs the interest of the people disadvantaged in this case.

A second factor distinguishing the instant situation from that described in Burton v. Wilmington Parking Authority is also noted in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627, 638 (1972):

> [T]here is nothing approaching the symbiotic relationship between lessor and lessee that was present in Burton, where the private lessee obtained the benefit of locating in a building owned by the state-created parking authority, and the parking authority was enabled to carry out its primary public purpose of furnishing parking space by advantageously leasing portions of the building constructed for that purpose to commercial lessees such as the owner of the Eagle Restaurant.

The symbiotic relationship in Burton v. Wilmington Parking Authority included an obligation on the part of the Authority to maintain and repair Eagle's premises. In addition the Authority provided the restaurant with heat and electricity. In contrast, the Orange Memorial Hospital Corporation is ultimately responsible for the daily maintenance, upkeep, and operation of the facility. The lease requires the lessee to maintain and operate the hospital at its own expense and to hold the lessor harmless from any liability incurred in operating the facility. The lessee is required during the term of the lease to provide adequate fire, tornado, and explosion insurance and in the event of any damage to use the proceeds to repair the hospital.

In addition to the absence of a physical relationship like the one found between the Authority and the restaurant in Burton v. Wilmington Parking Authority, there is also no showing of other "benefits mutually conferred" which allows us to characterize the hospital and the county as joint venturers. There are unquestionably indirect benefits accruing to Orange County by virtue of the corporation's operation of the hospital. As the lease states, the county is relieved of the expense and responsibility of operating a hospital. There is, however, no indication, as there was in Burton v. Wilmington Parking Authority that the benefits accruing to the county were directly attributable to the objectionable activities of a joint venturer. In *Burton* the financial success of the State's project depended at least in part upon the popularity and income of the Eagle Restaurant.

The restaurant owners believed that a policy of racial discrimination was necessary in order to ensure the maximum volume of business and the Authority, in its own interest, acquiesced in this policy. In short, the intimate physical and financial relationship enjoyed by the Eagle Restaurant and the Parking Authority in *Burton* is not present in this case. The interdependence of the entities, so important to the decision in *Burton,* is absent here.

The independence of the Orange Memorial Hospital and Orange County is also reflected in the absence of a nexus between the County's involvement with the Hospital and the Hospital's abortion policy presently under scrutiny. As the court said in Doe v. Bellin Memorial Hospital, 479 F.2d 756, 761 (7th Cir. 1973):

> There is no claim that the state has sought to influence hospital policy respecting abortions, either by direct regulation or by discriminatory application of its powers or its benefits. Insofar as action of the State of Wisconsin or its agents is disclosed by the record, the State has exercised no influence whatsoever on the decision of the defendants which plaintiffs challenge in this litigation.

In fact the lease between Orange County and the Hospital Corporation explicitly provides that the *lessee* shall prescribe the terms and regulations of medical care given in the facility. The record affirmatively shows that the county officials neither directly nor indirectly participated in the formulation of the presently disputed hospital policy. See text, *infra*. See also, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627, 639 (1972); Blouin v. Loyola, 506 F.2d 20 (5th Cir. 1975); Driscoll v. International Union of Op. Eng., Local 139, 484 F.2d 682 (7th Cir. 1973); Pendrell v. Chatham College, 370 F.Supp. 494 (W.D.Pa. 1974).

Finally, we note that in contrast to the situation in Burton v. Wilmington Parking Authority, the Commissioner's Court of Orange County retained no power to amend the hospital corporation's decision to prohibit the performance of elective abortions. The lease explicitly provides that the

> Lessee agrees to operate the hospital situated on the above described property for the duration of this lease as a non-profit institution, and thereby furnish to the general public medical and surgical care and treatment, *subject to such terms and regulations as Lessee may prescribe.* (emphasis added)

There is no evidence that in acquiring federal funds or in leasing the hospital facility the corporation ever accepted a condition relating to the performance or non-performance of abortions. Doe v. Bellin Memorial Hospital, 479 F.2d 756, 761 (7th Cir. 1973). The Parking Authority in *Burton,* on the other hand, was specifically obligated to operate in a non-discriminatory manner.

We would be less than candid not to acknowledge Orange County's limited involvement and interest in the hospital facility. The lease does obligate the hospital corporation to serve the general public, to admit indigent patients, to abide by the provisions of the Hospital Survey and Construction Act, to provide the county auditor with a yearly financial report (and any other information requested), and to obtain county approval before disposing of hospital property. These factors are not unusual in the lessor-lessee relationship. The Court in Jackson v. Metropolitan Edison Company, 419 U.S. 345, 95 S.Ct. 449, 453, 42 L.Ed.2d 477, 484 (1974) fairly summarizes Orange Memorial Hospital's status:

> It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be "state" acts than will the

> acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.

We do not feel that the nature of Orange County's involvement with the hospital facility justifies a finding of state action.

Dr. Greco's assertion that the instant appeal is governed by Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946) and Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953) is also ill-founded. Recent decisions have more explicitly defined the applicability of *Marsh* and *Terry* stating that a business is not a state actor merely because the enterprise is affected with a public purpose. See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed. 2d 477, 485 (1974); Central Hardware Co. v. NLRB, 407 U.S. 539, 92 S.Ct. 2238, 33 L.Ed.2d 122, 128-29 (1972); Lloyd Corp. v. Tanner, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed. 2d 131 (1972). In *Marsh*, Gulf Shipbuilding Corporation held title to all the land in the "company town" and assumed the responsibilities of providing traditional municipal services, including police protection, to the residents of the town. *Terry* involved a duplicitous county primary scheme designed to disenfranchise black voters. No such peculiarly governmental function has been assumed by the Orange Memorial Hospital Corporation. Lloyd Corp. v. Tanner, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131, 143 (1972).

In summary, we find that Orange County is not sufficiently connected with the Orange Memorial Hospital Corporation's activities to imbue those actions with the attributes of the state. The involvement of the County is not sufficiently related to the corporation's decision to prohibit elective abortions to justify the imposition of Constitutional restrictions upon the daily business of the hospital.[19] Absent a charge of racial discrimination we are disinclined to press that state action doctrine and all that it entails into the internal affairs of a hospital.[20] Moreover we do not perceive Orange Memorial Hospital as an entity exercising peculiarly governmental functions which might, in the absence of constitutional restrictions, be employed in derogation of a citizen's fundamental rights.

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[19] We are not willing to hold that the district court erred in reaching the following conclusion:

> In the present case the Court finds that the Orange Memorial Hospital is a private hospital operated by the Orange Memorial Hospital Corporation, which is a non-profit corporation. The evidence supports the conclusion that Orange County and the State of Texas have never sought to regulate or influence the medical policy to be followed within the hospital and in particular with respect to the performance or non-performance of elective abortions therein. The County and State have remained completely neutral on the medical policy of the hospital. Therefore, there is no state action involved and the defendants were not acting under color of state law.

374 F.Supp. at 233.

[20] In an entirely different context this court sitting en banc has recently dealt with the state action concept in Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1975). In *Fitzgerald* a state prisoner petitioned for a writ of federal habeas corpus claiming that his state trial was unfair, that he was denied the effective assistance of counsel and that state action was involved. He buttressed his claims with the assertion that the adjudication of state criminal cases is a vital and structured function of the state. He argued that state action was involved because he was prosecuted by a state prosecutor, in a state court, before a state judge in a state courthouse before a jury selected according to state law and paid by the state. Indeed he asserted that from arrest to ultimate release he was in the hands of a state operated system and that even his privately retained counsel was a crucial part of the state adjudicatory machinery. These facts were undisputed. We succinctly concluded:

> [the] conclusion that the Fourteenth Amendment state action requirement is satisfied in every ineffectiveness of retained counsel case "because the state adjudicatory machinery is inextricably intertwined with the conduct of an accused person's retained attorney" reaches far too far.

505 F.2d at 1337.

The complaint of Dr. Greco is important and we have tried to give his arguments and allegations careful consideration. However, all of

For the reasons stated we affirm the judgment of the district court.[21]

Affirmed.

Clark, Circuit Judge (concurring):

Despite Judge Gewin's forceful opinion, I remain convinced that Orange County and this hospital enjoy precisely the sort of symbiotic relationship defined in *Burton*. To their mutual advantage, the county furnished land, buildings and facilities while operation and supervision by the hospital board and medical staff provided the general county community with health services and provided priority medical care for the county's indigent citizens.

However, I still come down on the side of affirming the dismissal because the particular claim asserted is not actionable. *Doe* and *Roe* teach that a state cannot forbid certain types of abortions, but they do not create any duty on Orange County's part to furnish facilities for such operations. Just as the Eagle Coffee Shop in Wilmington's parking garage could not have been forced to furnish kosher food or serve fish on Friday, so the Orange County Hospital cannot be compelled to allow its facilities to be used for elective abortions. *Contra*, Doe v. Hale Hospital, 500 F.2d 144 (1st Cir. 1974), and Nyberg v. City of Virginia, *supra*.

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his assertions relate only to his alleged right to conduct a certain type of surgical procedure at one specific hospital. On the other hand, Fitzgerald's petition for Great Writ presented an appealing plea for liberty which had been abridged by a state prison sentence confining him to a state prison for a substantial number of years. The claims of Dr. Greco are not nearly so ominous as those of Fitzgerald.

[21] Dr. Greco's contention that the medical staff was improperly dismissed from the suit is, therefore, moot.

Doctor Robert Sosa, Plaintiff-Appellee,

v.

Board of Managers of the Val Verde Memorial Hospital, Defendant-Appellant.

No. 29458.

United States Court of Appeals,
Fifth Circuit.

Jan. 6, 1971.

Rehearing Denied Feb. 16, 1971.

Doctor brought suit claiming that hospital board had violated due process and equal protection clauses of Fourteenth Amendment in denying him admission to medical staff of hospital. The United States District Court for the Western District of Texas, Dorwin W. Suttle, J., entered judgment, and hospital board appealed. Hospital board's motion for stay of injunction pending appeal was granted, 425 F.2d 44, but subsequently stay was vacated. The Court of Appeals, Goldberg, Circuit Judge, held that where hospital governing board concluded for stated reasons that plaintiff doctor should not be admitted to staff of hospital and reasons bore important and reasonable relationship to proper management of hospital but record did not show whether doctor was afforded procedural due process in the hearing, case would be remanded for determination of propriety of procedures used by board.

Reversed and remanded.

1. Constitutional Law Key 213

Hospital governing board was public body receiving both state and federal funds and its acts were state acts and had to comport with provisions of Fourteenth Amendment. U.S.C.A. Const. Amend. 14; Vernon's Ann.Tex.Civ.St. arts. 4478 to 4494r-3; Public Health Service Act, § 600 et seq., 42 U.S.C.A. § 291 et seq.

2. Hospitals Key 6

A doctor has no constitutional right to staff privileges of hospital merely because he is licensed to practice medicine.

3. Hospitals Key 6

Fact that doctor met requirements of by-laws of hospital governing board that member of medical staff be graduate of approved medical school, legally licensed to practice in state and practicing in the community or within a reasonable distance of hospital would not confer an unconditional right to hospital privileges, and hospital board could properly require additional standards as to character, qualifications and standing in the community.

4. Hospitals Key 6

Subjectives of selection of member of medical staff of hospital cannot be minutely codified and governing board of hospital must be given great latitude in prescribing necessary qualifications for potential applicants.

5. Constitutional Law Key 318

In exercising its broad discretion, hospital governing board must refuse staff applicants only for those matters which are

reasonably related to operation of hospital, and procedural due process must be afforded applicant so that he may explain or show to be untrue those matters which might lead board to reject his application. U.S.C.A.Const. Amend. 14.

6. Hospitals Key 6

So long as staff selections for hospital are administered with fairness, geared by rationale compatible with hospital responsibility and unencumbered with irrelevant considerations, a court should not interfere with board's determination. U.S.C.A.Const. Amend. 14.

7. Courts Key 406.9(9)

Where hospital governing board concluded for stated reasons that plaintiff doctor should not be admitted to staff of hospital and reasons bore important and reasonable relationship to proper management of hospital but record did not show whether doctor was afforded procedural due process in the hearing, case would be remanded for determination of propriety of procedures used by board. U.S.C.A.Const. Amend. 14; Vernon's Ann. Tex.Civ.St. arts. 4478 to 4494r-3; Public Health Service Act, § 600 et seq., 42 U.S.C.A. § 291 et seq.

C. Dean Davis, Davis & Nobles, Austin, Tex., for defendant-appellant.

Arturo Gonzalez, Del Rio, Tex., for plaintiff-appellee.

Before Tuttle, Bell, and Goldberg, Circuit Judges.

Goldberg, Circuit Judge:

This case poses the problem of the conflict between the right of a doctor to be on the staff of a hospital and the obligation

of the hospital to exact professional competence and the ethical spirit of Hippocrates as conditions precedent to such staff privileges.

Dr. Robert Sosa brought this suit against the Board of Managers of the Val Verde Memorial Hospital, claiming that the Board had violated the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution in denying him admission to the Medical Staff of the hospital.

[1] The Board of Managers is the governing body of the Val Verde Memorial Hospital, which is a county institution established pursuant to Vernon's Ann.Tex.Rev.Civ.Stat. arts. 4478 to 4494r-3. The Board is appointed by the County Commissioners Court of Val Verde County, and the hospital was constructed and is maintained and operated with county funds supplemented by federal aid under the Hill-Burton Act, 42 U.S. C.A. § 291 *et seq*. It is perfectly clear, therefore, that the Board of Managers of the Val Verde Memorial Hospital is a public body receiving both state and federal funds. Its acts are thus state acts and must comport with the provisions of the Fourteenth Amendment. Sams v. Ohio Valley General Hospital Association, 4 Cir. 1969, 413 F.2d 826; Foster v. Mobile County Hospital Board, 5 Cir. 1968, 398 F.2d 227; Meredith v. Allen County War Memorial Hospital Commission, 6 Cir. 1968, 397 F.2d 33; Simkins v. Moses H. Cone Memorial Hospital, 4 Cir. 1963, 323 F.2d 959, cert. denied, 376 U.S. 938, 84 S.Ct. 793, 11 L.Ed.2d 659.

Dr. Sosa's dispute with the Board began in 1967 when he first sought admission to the Medical Staff of the hospital. This initial application was refused. Throughout 1968 Dr. Sosa made various additional attempts to gain admission to the staff, but these efforts were unavailing. His final application was submitted in August, 1969, and, like those which had preceded it, met with refusal. This suit was filed October 22, 1969, and alleged that the rejection of Dr. Sosa's application by the Board

was arbitrary and discriminatory and further constituted a denial of procedural due process by reason of the Board's failure to supply him with any reasons for its action.

The district court, after trial, found that the refusal of the Board to allow Dr. Sosa staff privileges had under the circumstances violated the doctor's constitutional rights secured by the Fourteenth Amendment. The court enjoined the Board from refusing Dr. Sosa membership on the Medical Staff, but conditioned his admission on "such reasonable limitations as the Board of Managers may formally impose under their by-laws."

Before the hospital acted on this order, Dr. Sosa made a motion before the district court that the defendants be held in contempt for failing to allow him admission to the hospital staff pursuant to the court's order. The defendants countered with a motion to stay the injunction pending appeal. On March 17, 1970, the district court denied the motion for stay and ordered that Dr. Sosa "be afforded membership on the Medical Staff of Val Verde Memorial Hospital for the purpose of general practice, including general medicine, diagnosis, non-operative obstetrics, minor surgery, and first aid in emergency, and that defendant herein continue to process plaintiff's application for further privileges consistent with their by-laws and the rules and regulations of the Medical Staff." On March 20, 1970, the district court entered a further order carrying the motion for contempt with the case and expanding the staff privileges to be accorded Dr. Sosa, ordering that in addition to the privileges heretofore granted, Dr. Sosa be allowed "to practice general medicine in the hospital doing both major and minor work, and general surgery, both major and minor, the same as every other Staff physician." The Board of Managers appealed from these actions of the district court.

On April 10, 1970, a panel of this court granted the Board of Managers' motion for a stay of the injunction pending appeal. On October 6, 1970, our panel, after oral argument, vacated

the stay of injunction and reinstated the district court's order of March 17, granting Dr. Sosa limited hospital privileges. This court further ordered that the processing of Dr. Sosa's application for further privileges, required by the district court's order of March 17, be completed within 30 days and a report transmitted to this court immediately.

The Hospital Board complied with our instructions and held a hearing concerning Dr. Sosa's admission to the Medical Staff and the privileges to be accorded him. The Board voted unanimously that Dr. Sosa be denied any further privileges over and above those ordered by the district court in its March 17, 1970, order and further voted unanimously that "had the court not ordered Dr. Sosa placed on the Staff, based on the testimony received * * *, it is the decision of the Board that Dr. Sosa's application for Medical Staff privileges be denied for the following reasons:

1) Abandonment of obstetrical patients while in active labor, who had previously received pre-natal care from Dr. Sosa, because they could not pay his bill.

2) Lack of knowledge of basic minor surgery techniques, basic operating procedures, and instrument identification and use, sufficient to jeopardize patient care.

3) Unstable physical demeanor, visible indecision and nervousness in operating room situations, likely to jeopardize helpless and unconscious patients.

4) Unstable and potentially dangerous mental condition manifested by numerous examples of anger and fits of rage towards patients, fellow physicians, and support personnel.

5) Unsatisfactory reports from references listed in Dr. Sosa's application.

6) Itinerant medical practice patterns since completing his formal medical education.

7) Pleas of guilty for two felony charges.

8) Suspension of medical license by Texas and Michigan Boards of Medical Examiners.

9) Violation of five of the ten Principles of Medical Ethics."

Since the trial court has had no opportunity to examine this latest action of the Hospital Board, we think the case must be remanded for a determination of whether the proceedings comported with standards of due process. In so doing we think it is appropriate for this court to establish some guidelines for the district court in this matter.

[2] Suits by physicians who have been denied hospital staff privileges are not new. It has been clearly established for years that a doctor has no constitutional right to the staff privileges of a hospital merely because he is licensed to practice medicine. Hayman v. Galveston, 1927, 273 U.S. 414, 47 S.Ct. 363, 71 L.Ed. 714. Rather, in speaking of staff selection the Supreme Court in *Hayman* said:

> "In the management of a hospital, quite apart from its use for educational purposes, some choice in methods of treatment would seem inevitable, and a selection based upon a classification having some basis in the exercise of the judgment of the state board whose action is challenged is not a denial of the equal protection of the laws. * * *" 273 U.S. at 417, 47 S.Ct. at 364.

In the instant case the by-laws of the Hospital Board require the Board to appoint a Medical Staff composed of those who are "(1) graduates of an approved medical school, (2) legally licensed to practice in the State of Texas, and (3) practicing in the community or within a reasonable distance of the hospital." The by-laws also provide the procedures which the Board must follow in exercising its appointment functions. The Credentials Committee of the Medical Staff must first investigate the char-

acter, qualifications, and standing of the applicant and report its findings to the Medical Staff. The Medical Staff then reports its recommendations to the Board, which must either accept the recommendation of the Medical Staff or refer the matter back to the Medical Staff for further consideration.

[3] Dr. Sosa clearly met the three "paper qualifications" stated in the hospital by-laws. He was a graduate of an approved medical school, was licensed to practice medicine in the State of Texas, and was in practice within a reasonable distance from the hospital. We do not think, however, that this stated triad confers an unconditional right to hospital privileges if the Hospital Board chooses to exact additional standards reasonably related to the operation of the hospital. Foster v. Mobile County Hospital Board, *supra;* Cypress v. Newport News General and Non-Sectarian Hospital Association, Inc., 4 Cir. 1967, 375 F.2d 648; North Broward Hospital District v. Mizell, Fla. 1962, 148 So.2d 1; Green v. City of St. Petersburg, 1944, 154 Fla. 339, 17 So.2d 517; Sussman v. Overlook Hospital Association, 1967, 95 N.J.Super. 418, 231 A.2d 389; Davidson v. Youngstown Hospital Association, 1969, 19 Ohio App.2d 246, 250 N.E.2d 892; Duson v. Poage, Tex.Civ.App.1958, 318 S.W.2d 89, error ref. n. r. e.

In the present case the Board had seen fit to require additional standards beyond the minimal criteria specified in the by-laws and had authorized the Credentials Committee to examine applicants for character, qualifications, and standing in the community, and to report its findings to the Medical Staff. Following the Committee report the Medical Staff obviously determined that Dr. Sosa did not meet its standards in these areas. It therefore recommended that the Board not appoint Dr. Sosa, and the Board followed this recommendation.

[4] We think the stated factors used by the Credentials Committee of the Medical Staff to evaluate staff applicants are reasonable. This court has recently indicated that staff appointments

may be constitutionally refused if the refusal is based upon "any reasonable basis, such as the professional and ethical qualifications of the physicians or the common good of the public and the Hospital." Foster v. Mobile County Hospital Board, *supra,* 398 F.2d at 230. Admittedly, standards such as "character qualifications and standing" are very general, but this court recognizes that in the area of personal fitness for medical staff privileges precise standards are difficult if not impossible to articulate. North Broward Hospital District v. Mizell, *supra.* The subjectives of selection simply cannot be minutely codified. The governing board of a hospital must therefore be given great latitude in prescribing the necessary qualifications for potential applicants. Foster v. Mobile County Hospital Board, *supra;* North Broward Hospital District v. Mizell, *supra;* Sussman v. Overlook Hospital Association, *supra.* Contra, Milford v. People's Community Hospital Authority, 1968, 380 Mich. 49, 155 N.W.2d 835. So long as the hearing process gives notice of the particular charges of incompetency and ethical fallibilities, we need not exact a précis of the standard in codified form.

[5] On the other hand, it is clear that in exercising its broad discretion the board must refuse staff applicants only for those matters which are reasonably related to the operation of the hospital. Arbitrariness and false standards are to be eschewed. Moreover, procedural due process must be afforded the applicant so that he may explain or show to be untrue those matters which might lead the board to reject his application. Foster v. Mobile County Hospital Board, *supra;* Meredith v. Allen County War Memorial Hospital Commission, *supra;* Citta v. Delaware Valley Hospital, E.D. Penn. 1970, 313 F.Supp. 301.

[6] In the instant case there was considerable evidence regarding Dr. Sosa's ethical and professional competency. No court should substitute its evaluation of such matters for that of the Hospital Board. It is the Board, not the court, which is charged with the responsibility of providing a competent staff of doctors. The Board has chosen to rely on the advice of its Medical Staff,

and the court cannot surrogate for the Staff in executing this responsibility. Human lives are at stake, and the governing board must be given discretion in its selection so that it can have confidence in the competence and moral commitment of its staff. The evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance. The court is charged with the narrow responsibility of assuring that the qualifications imposed by the Board are reasonably related to the operation of the hospital and fairly administered. In short, so long as staff selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations, a court should not interfere. Courts must not attempt to take on the escutcheon of Caduceus.

[7] In its last hearing the Hospital Board of the Val Verde Memorial Hospital concluded for various reasons that Dr. Sosa should not be admitted to the staff of the hospital. We think many of the reasons adduced bear an important and reasonable relationship to the proper management of the hospital and each appears to be supported by substantial evidence presented to the Board at its last hearing. We cannot tell from the record before us, however, whether Dr. Sosa was afforded procedural due process in the latest Board hearing. We therefore remand this case to the district court to determine the propriety of the procedures used by the Board in making its latest determination. If the Board's procedures do comport with due process requirements, then its determination to deny staff privileges to Dr. Sosa should be affirmed.

The judgment of the court below is reversed and the cause remanded for further proceedings not inconsistent with this opinion. Until the further decision by the trial court of this issue remanded to it, Dr. Sosa's privileges shall remain as they are now under our order of October 6, 1970.

Reversed and remanded.

United States District Court
Middle District of Florida
Orlando Division

Dr. John G. Madry, Jr.,
Plaintiff,
vs.
Dr. Otto G. Sorel, et al.,
Defendants.

Case No.
69-136-Orl-Civ-Y.

ORDER

(1) Defendant Brevard Hospital Association, Inc. is a non-profit Florida corporation and owns and operates Brevard Hospital. The property where said Hospital is now situated, and at all times pertinent hereto has been situated, was acquired by the defendant Association from the City of Melbourne for the nominal consideration of one dollar, the property to revert to the City if it should cease to be used for a hospital. The original facility located on that property was paid for by contributions by the public and funds appropriated by the Federal Government pursuant to the Hill-Burton Act, 42 U. S. C. A. § 291 *et seq.*, in approximately equal portions, in 1962.

In 1967 the facility was expanded, again using Hill-Burton funds for approximately one-third of the cost and the remainder being derived from public contributions and private loan. Plans exist for a further expansion, and the defendant Association has a commitment from the United States Department of Health, Education & Welfare to guarantee pursuant to the Hill-Burton Act, a loan for 90% of the cost of the expansion and to pay three percentage points of the annual interest charges on such loan. There thus will be a continuing infusion of Federal funds into the hospital during the life of the loan.

When the parking lot of the Hospital was expanded, Brevard County supplied labor and equipment to accomplish the work, without charge to the Hospital or Association.

(2) At the time the Hill-Burton funds were obtained for construction of the original facility in 1962, the by-laws of the defendant Association provided in Article III, Secvtion 1, Paragraph (A) as follows:

> "Composition of the Board of Governors—A Board of Governors comprising, ex-officio, the Mayors of the incorporated municipalities in Brevard County Commissioner District 3 and 5 and the Brevard County Commissioners of Districts 3 and 5; together with 12 elected members of the Association of whom four are elected at each annual meeting of the Association for a term of three years."

On June 6, 1973 [*sic.;* should be 1963], the by-laws of the defendant Association were revised. Article III, Section 1, Paragraph A of the revised by-laws provided:

> "Composition of the Board of Governors—A Board of Governors comprising, ex-officio, the Mayors of the Incorporated Municipalities in Brevard County Commissioner Districts 3 and 5 and the Brevard County Commissioners of the Districts 3 and 5; together with 12 elected members of the Association of whom four are elected at each annual meeting of the Association for a term of three years. No member of the Board of Governors or the spouse of an elected member of the Board of Governors shall be an employee of Brevard Hospital."

At the hearing on August 14, 1974 counsel for the defendant Association acknowledged that the by-laws had been amended again after Dr. Madry's dismissal and after this suit was begun to eliminate the county and municipal officials who theretofore had been members of the Board of Governors. Counsel for the

Hospital urged that because the Mayors and County Commissioner members were "ex officio", they were not entitled to vote. There was no such restriction on their participation in the by-laws, and the Court does not so interpret the phrase "ex officio". In any event, the municipal and county officers were entitled to be members of the Board of Governors and presumably could have had some influence upon its deliberations and decisions even though there is no evidence that they did.

(3) The Brevard Hospital accepts medically indigent patients from the Brevard County Health Department and receives a flat fee per patient, which is not sufficient to cover the cost of the medical services. One such patient was the woman whose treatment by Dr. Madry, plaintiff herein, was the event that triggered his expulsion from the Hospital's Medical Staff, as pointed out hereinafter.

(4) Brevard Hospital is exempt from the ad valorem taxes levied generally upon real property by Brevard County and the City of Melbourne. That exemption constitutes an indirect payment of County and City funds to the Hospital and is equally as effective a contribution to the Hospital as a direct payment would be. That tax exemption is created by § 196.192, Fla. Stat., a law of the State of Florida.

(5) By reason of the participation of municipal and county officials, as members of the Board of Governors, in the affairs of the Hospital prior to the time of Dr. Madry's expulsion; by reason of the application of City property, County property and services and Federal funds to the construction, expansion and improvement of the Hospital; by reason of the indirect subsidization of the Hospital by the County and City through tax exemption pursuant to State law; and by reason of the relationship between the Hospital and Brevard County for care of indigents, the acts of the Board of Governors of Brevard Hospital Association, Inc. at the time of Dr. Madry's expulsion were sufficiently infused with state action so as to require that such

acts must comport with the requirements of "due process of law" within the meaning of the Fifth and Fourteenth Amendments of the United States Constitution. See *Sosa v. Board of Managers of Val Verde Memorial Hospital*, 437 F.2d 173, 174 (5th Cir. 1971), and cases there cited. This Court previously so ruled herein by its orders of July 15, and September 1, 1971.

(6) This case arises under the Constitution and laws of the United States, and the amount in controversy exceeds $10,000, exclusive of interest and costs. Therefore, this Court has jurisdiction of the case under 28 U.S.C.A. § 1331.

(7) Plaintiff Dr. John G. Madry was a member of the Medical Staff of Brevard Hospital. Following a series of events that occurred over a period of several years, Dr. Madry was on May 27, 1966 "permanently suspended" for [*sic*] his professional privileges at that Hospital and his appointment to its Medical Staff "terminated".

(8) As previously ruled herein, Dr. Madry's original expulsion from the Medical Staff did not meet the requirements of due process of law for a fair hearing before an impartial tribunal after adequate notice of the hearing and of the matters to be asserted against him. Although the practice of medicine in a particular hospital may be a privilege and not an absolute right, yet the blemish upon a professional reputation and the restriction of a physician's opportunity to earn a livelihood that result when he is expelled from a hospital constitute a sufficient property right to require that the expulsion be accomplished in accordance with due process of law. *Sosa v. Val Verde Hospital, supra; Woodbury v. McKinnon*, 447 F.2d 839 (5th Cir. 1971).

(9) Therefore, by Orders entered July 15, 1971 and September 1, 1971, this Court directed the defendant Board of Governors of the Brevard Hospital Association to hold a "due process of law hearing" of the charges brought against plaintiff.

Said Board of Governors (ten of its twelve members sitting) held hearings over a period of six days and 60 hours during November 1971, and on November 19, 1971, the Board's counsel filed with this Court "Findings of the Board of Governors of Brevard Hospital Regarding Dr. John G. Madry, Jr." Of the nine charges against plaintiff, the Board in such "Findings" found no evidence concerning Charge 9 and found Charge 3 not substantiated. It found the remaining charges "substantiated" and concluded, "The Board does hereby reaffirm the permanent suspension of Dr. John G. Madry from membership on the Medical Staff of Brevard Hospital."

After the transcript of the hearings before the Board of Governors was prepared and filed with this Court, plaintiff filed a "Motion (1) To Set Aside 'Findings of the Board of Governors of Brevard Hospital Regarding Dr. John G. Madry, Jr.'; (2) For Summary Judgment for Plaintiff; (3) For Temporary and Permanent Injunctive Relief; and (4) In the Alternative, for a Hearing Before a Fair and Impartial Tribunal." After consideration of the written and oral arguments of counsel for all parties addressed to those motions, and upon consideration of all the pleadings and all the evidence of record, the Court finds further:

(10) The hearings before the Hospital's Board of Governors in November, 1971, failed to accord plaintiff the "due process of law" to which this Court has previously found him to be entitled. At the beginning of such hearings plaintiff challenged the ability of the Board of Governors to grant plaintiff the fair and impartial hearing that is an essential ingredient of due process of law. In connection therewith, plaintiff was allowed to examine each of the Board's members present as to such member's interest, bias, prejudice, or preconceived ideas. Additionally, plaintiff has interrogated some of the Board's members by depositions.

In the deposition of Board Member Harold E. O'Kelley, it developed that on October 2, 1969, he wrote a letter to 4,000 persons soliciting proxies for himself for the 1969 meeting of the Brevard Hospital Association. In that letter he represented that he would cast the votes for which he held the proxies to elect members of the Board of Governors who would prevent Dr. Madry's reinstatement to the Medical Staff of Brevard Hospital.

A similar letter was written by Board Member Kathryn R. Lowery, who also was Secretary to the Brevard Hospital Association, on September 25, 1969, to a large number of Brevard County residents; and yet another such letter was written on October 14, 1969, by Jane H. Jones, President of the Brevard Hospital Service Guild.

The efforts of Mr. O'Kelley and Mme. Lowery and Jones to obtain proxies were successful. Mr. O'Kelley and Mrs. Lowery remained on the Board, as did most of their colleagues, at least until the time of the November, 1971, hearings. Thereafter, solicitation of proxies became unnecessary, as the Brevard Hospital Association by-laws were amended (Art. II, Sec. 1) to empower the Board of Governors to name its own members.

(11) From the record herein it is patent that the dispute between Dr. Madry and Brevard Hospital became a *cause celebre* in the community that the hospital serves. The newspaper editorial attached to Mr. O'Kelley's letter evidences a vigorous political assault by Dr. Madry to achieve reinstatement and an equally vigorous political defense by the Board of Governors of its prior decision reached without a hearing.

(12) The Board of Governors refused to hear Dr. Madry's side of the case until ordered by this Court to do so. Moreover, when that hearing was held, the Board considered not only the charge that precipitated Dr. Madry's dismissal from the Medical Staff, the alleged sterilization of a woman without specific written consent, but everything that Dr. Madry had ever done since his first appearance in Brevard County, including other charges which went back for ten years and for which he had suffered the penalties as they went along. It had not been the Court's understanding when this case was sent back to the Board that all these charges were going to be drawn into the hearing.

(13) The Chairman of the Board of Governors, Mr. Holmes, is a defendant in damages in this case and therefore has an economic interest adverse to that of Dr. Madry.

(14) At the beginning of the November 1971 hearing, each Board member declared that he or she would listen to the evidence presented and decide the case according to that evidence without considering the prior determination, made without a hearing, that Dr. Madry should be dismissed from the Medical Staff. Without in any way questioning the good faith of the Board members' declarations, the Court nevertheless finds that "the local realities underlying this case" (*Berryhill v. Gibson*, 93 Sup. Ct. 1689, 1698) require it to be determined by some one other than the Board of Governors as constituted. As said by Mr. Justice Black, the Constitution "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between the contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice'. *Offutt v. United States*, 348 U. S. 11, 14." In re *Murchison*, 349 U. S. 133, 136 (1955).

(15) Moreover the November 1971 hearings were conducted in the atmosphere of giving Dr. Madry an opportunity to prove his innocence of the charges against him. In the voir dire, the tenor of the expressions of "impartiality" by the Board's members was that they would consider the evidence and vacate their prior decision if it was proved wrong. Such a shift in the burden

of proof from the charging party to the respondent also is inconsistent with due process.

(16) The Board of Governors of Brevard Hospital Association, Inc. cannot, as constituted, in the light of the history of this case, itself provide plaintiff a hearing that meets the requirements of due process of law.

(17) Defendants are hereby ordered to file with this Court (serving copies upon other counsel) within 20 days from the date hereof, a plan for a proposed procedure for a reconsideration of the record of the November 1971 hearings that will meet the requirements of due process of law, to the satisfaction of the Court.

DONE AND ORDERED in Chambers at Orlando, Florida this 22nd day of January, 1975.

/s/ George C. Young
Chief Judge

Copies to:

Thorwald, J. Husfeld, Esquire
Post Office Box 329
Deland, Florida 32720

J. Compton French, Esquire
Post Office Box 5357
Daytona Beach, Florida 32020

William H. Gleason, Esquire
121 Fifth Avenue
Indialantic, Melbourne, Florida 32903

Theodore M. Forbes, Jr., Esquire
4000 First National Bank Tower
Atlanta, Georgia 30303

Elting L. Storms, Esquire
Box 1376
Melbourne, Florida 32901

Ralph Geilich, Esquire
Post Office Box 820
Melbourne, Florida 32901

G. W. Hedman, Esquire
1103 Hibiscus Boulevard
Melbourne, Florida 32901

Leon H. Handley, Esquire
Post Office Box 1273
Orlando, Florida 32802

Messrs. Marks, Gray, Yates,
Conroy and Gibbs,
P. O. Box 447
Jacksonville, Florida 32202

HOSPITAL SURVEY AND CONSTRUCTION ACT

60 Stat. 1041

An Act to amend the Public Health Service Act to authorize grants to the States for surveying their hospitals and public health centers and for planning construction of additional facilities, and to authorize grants to assist in such construction.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

This Act may be cited as the "Hospital Survey and Construction Act".

Sec. 2. The Public Health Service Act (consisting of titles I to V, inclusive, of the Act of July 1, 1944, 58 Stat. 682) is hereby amended by adding at the end thereof the following new title:

"Title VI—Construction of Hospitals
"Part A—Declaration of purpose

Sec. 601. The purpose of this title is to assist the several States—

"(a) to inventory their existing hospitals (as defined in section 631(e)), to survey the need for construction of hospitals, and to develop programs for construction of such public and other non-profit hospitals as will, in conjunction with existing facilities, afford the necessary physical facilities for furnishing adequate hospital, clinic, and similar services to all their people; and

"(b) to construct public and other nonprofit hospitals in accordance with such programs.

"Part B—Surveys and planning
"Authorization of appropriation

"Sec. 611. In order to assist the States in carrying out the purposes of section 601(a), there is hereby authorized to be appropriated the sum of $3,000,000, to remain available until expended. The sums appropriated under this section shall be used for making payments to States which have submitted, and had approved by the Surgeon General, State applications for funds for carrying out such purposes.

"State applications

"Sec. 612. (a) To be approved, a State application for funds for carrying out the purposes of section 601(a) must—

"(1) designate a single State agency as the sole agency for carrying out such purposes: *Provided*, That after a State plan has been approved under section 623, any further survey or programming functions shall be carried out, pursuant to section 623(a)(10), by the agency designated in accordance with section 623(a)(1);

"(2) provide for the designation of a State advisory council, which shall include representatives of nongovernment organizations or groups, and of State agencies, concerned with the operation, construction, or utilization of hospitals, including representatives of the consumers of hospital services selected from among persons familiar with the need for such services in urban or rural areas, to consult with the State agency in carrying out such purposes;

"(3) provide for making an inventory and survey in accordance with section 601 (a) containing all information required by the Surgeon General, and for developing a program in accordance with section 601(a) and with regulations prescribed under section 622; and

"(4) provide that the State agency will make such reports, in such form and containing such information, as the Surgeon General may from time to time reasonably require, and give the Surgeon General, upon demand, access to the records on which such reports are based.

"(b) The Surgeon General shall approve any application for funds which complies with the provisions of subsection (a).

"Allotments to States

"Sec. 613. (a) Each State for which a State application under section 612 has been approved shall be entitled to an allotment of such proportion of any appropriation made pursuant to section 611 as its population bears to the population of all the States, and within such allotment it shall be entitled to receive 33⅓ per centum of its expenditures in carrying out the purposes of section 601(a) in accordance with its application: *Provided*, That no such allotment to any State shall be less than $10,000. The Surgeon General shall from time to time estimate the sum to which each State will be entitled under this section during such ensuing period as he may determine, and shall thereupon certify to the Secretary of the Treasury the amount so estimated, reduced or increased, as the case may be, by any sum by which the Surgeon General finds that his estimate for any prior period was greater or less than the amount to which the State was entitled for such period. The Secretary of the Treasury shall thereupon, prior to audit or settlement by the General Accounting Office, pay to the State, at the time or times fixed by the Surgeon General, the amount so certified.

"(b) Any funds paid to a State under this section and not expended for the purposes for which paid shall be repaid to the Treasury of the United States.

"Part C—Construction of Hospitals and Related Facilities
"Authorization of Appropriations

"Sec. 621. In order to assist the States in carrying out the purposes of section 601 (b) there is hereby authorized to be appropriated for the fiscal year ending June 30, 1947, and for each of the four succeeding fiscal years, the sum of $75,000,000 for the construction of public and other nonprofit hospitals; and there are further authorized to be appropriated for such construction the sums provided in section 624. The sums appropriated pursuant to this section shall be used for making payments to States which have submitted, and had approved by the Surgeon General, State plans for carrying out the purposes of section 601 (b); and for making payments to political subdivisions of, and public or other nonprofit agencies in, such States.

"General regulations

"Sec. 622. Within six months after the enactment of this title, the Surgeon General, with the approval of the Federal Hospital Council and the Administrator, shall by general regulation prescribe—

"(a) The number of general hospital beds required to provide adequate hospital services to the people residing in a State, and the general method or methods by which such beds shall be distributed among base areas, intermediate areas, and rural areas: *Provided*, That for the purposes of this title, the total of such beds for any State shall not exceed four and one-half per thousand population, except that in States having less than twelve and more than six persons per square mile the limit shall be five beds per thousand population, and in States having six persons or less per square mile the limit shall be five and one-half beds per thousand population; but if, in any area (as defined in the regulations) within the State, there are more beds than required

by the standards prescribed by the Surgeon General, the excess over such standards may be eliminated in calculating this maximum allowance.

"(b) The number of beds required to provide adequate hospital services for tuberculosis patients, mental patients, and chronic-disease patients in a State, and the general method or methods by which such beds shall be distributed throughout the State: *Provided*, That for the purposes of this title the total number of beds for tuberculosis patients shall not exceed two and one-half times the average annual deaths from tuberculosis in the State over the five-year period from 1940 to 1944, inclusive, the total number of beds for mental patients shall not exceed five per thousand population, and the total number of beds for chronic-disease patients shall not exceed two per thousand population.

"(c) The number of public health centers and the general method of distribution of such centers throughout the State, which for the purposes of this title, shall not exceed one per thirty thousand population, except that in States having less than twelve persons per square mile, it shall not exceed one per twenty thousand population.

"(d) The general manner in which the State agency shall determine the priority of projects based on the relative need of different sections of the population and of different areas lacking adequate hospital facilities, giving special consideration to hospitals serving rural communities and areas with relatively small financial resources.

"(e) General standards of construction and equipment for hospitals of different classes and in different types of location.

"(f) That the State plan shall provide for adequate hospital facilities for the people residing in a State, without discrimination on account of race, creed, or color, and shall provide for

adequate hospital facilities for persons unable to pay therefor. Such regulation may require that before approval of any application for a hospital or addition to a hospital is recommended by a State agency, assurance shall be received by the State from the applicant that (1) such hospital or addition to a hospital will be made available to all persons residing in the territorial area of the applicant, without discrimination on account of race, creed, or color, but an exception shall be made in cases where separate hospital facilities are provided for separate population groups, if the plan makes equitable provision on the basis of need for facilities and services of like quality for each such group; and (2) there will be made available in each such hospital or addition to a hospital a reasonable volume of hospital services to persons unable to pay therefor, but an exception shall be made if such a requirement is not feasible from a financial standpoint.

"(g) General methods of administration of the plan by the designated State agency, subject to the limitations set forth in section 623 (a) (6) and (8).

State plans

"Sec. 623. (a) After such regulations have been issued, any State desiring to take advantage of this part may submit a State plan for carrying out the purposes of section 601 (b). Such State plan must—

"(1) designate a single State agency as the sole agency for the administration of the plan, or designate such agency as the sole agency for supervising the administration of the plan;

"(2) contain satisfactory evidence that the State agency designated in accordance with paragraph (1) hereof will have authority to carry out such plan in conformity with this part;

"(3) provide for the designation of a State advisory council which shall include representatives of nongovernment organizations or groups, and of State agencies, concerned with the operation, construction, or utilization of hospitals, including representatives of the consumers of hospital services selected from among persons familiar with the need for such services in urban or rural areas, to consult with the State agency in carrying out such plans;

"(4) set forth a hospital construction program (A) which is based on a State-wide inventory of existing hospitals and survey of need; (B) which conforms with the regulations prescribed by the Surgeon General under section 622 (a), (b), and (c); (C) which, in the case of a State which has developed a program under part B of this title, conforms to the program so developed except for any modification required in order to comply with regulations prescribed pursuant to section 622 (a), (b), and (c), and except for any modification recommended by the State agency designated pursuant to paragraph (1) of this subsection and approved by the Surgeon General; and (D) which meets the requirements as to lack of discrimination on account of race, creed, or color, and for furnishing needed hospital services to persons unable to pay therefor, required by regulations prescribed under section 622 (f);

"(5) set forth the relative need determined in accordance with the regulations prescribed under section 622 (d) for the several projects included in such programs, and provide for the construction, insofar as financial resources available therefor and for maintenance and operation make possible, in the order of such relative need;

"(6) provide such methods of administration of the State plan, including methods relating to the establishment and maintenance of personnel standards on a merit basis (except that the Surgeon General shall exercise no authority

with respect to the selection, tenure of office, or compensation of any individual employed in accordance with such methods), as the Surgeon General prescribes by regulation under section 622 (g);

"(7) provide minimum standards (to be fixed in the discretion of the State) for the maintenance and operation of hospitals which receive Federal aid under this part;

"(8) provide for affording to every applicant for a construction project an opportunity for hearing before the State agency;

"(9) provide that the State agency will make such reports in such form and containing such information as the Surgeon General may from time to time reasonably require, and give the Surgeon General, upon demand, access to the records upon which such information is based; and

"(10) provide that the State agency will from time to time review its hospital construction program and submit to the Surgeon General any modifications thereof which it considers necessary.

"(b) The Surgeon General shall approve any State plan and any modification thereof which complies with the provisions of subsection (a). If any such plan or modification thereof shall have been disapproved by the Surgeon General for failure to comply with subsection (a), the Federal Hospital Council shall, upon request of the State agency, afford it an opportunity for hearing. If such Council determines that the plan or modification complies with the provisions of such subsection, the Surgeon General shall thereupon approve such plan or modification.

"(c) No changes in a State plan shall be required within two years after initial approval thereof, or within two years after any change thereafter required therein, by reason of any change

in the regulations prescribed pursuant to section 622, except with the consent of the State, or in accordance with further action by the Congress.

"(d) If any State, prior to July 1, 1948, has not enacted legislation providing that compliance with minimum standards of maintenance and operation shall be required in the case of hospitals which shall have received Federal aid under this title, such State shall not be entitled to any further allotments under section 624.

"Allotments to States

"Sec. 624. Each State for which a State plan has been approved prior to or during a fiscal year shall be entitled for such year to an allotment of a sum bearing the same ratio to the sums authorized to be appropriated pursuant to section 621 for such year as the product of (a) the population of such State and (b) the square of its allotment percentage (as defined in section 631 (a)) bears to the sum of the corresponding products for all of the States. The amount of the allotment to a State shall be available, in accordance with the provisions of this part, for payment of 33⅓ per centum of the cost of approved projects within such State. The Surgeon General shall calculate the allotments to be made under this section and notify the Secretary of the Treasury of the amounts thereof. Sums allotted to a State for a fiscal year for construction and remaining unobligated at the end of such year shall remain available to such State for such purpose for the next fiscal year (and for such year only), in addition to the sums allotted for such State for such next fiscal year. Any amount of the sum authorized to be appropriated for a fiscal year which is not appropriated for such year, or which is not allotted in such year by reason of the failure of any State or States to have plans approved under this part, and any amount

allotted to a State but remaining unobligated at the end of the period for which it is available to such State, is hereby authorized to be appropriated for the next fiscal year in addition to the sum otherwise authorized under section 621.

"Approval of projects and payments for construction

"Sec. 625. (a) For each project for construction pursuant to a State plan approved under this part, there shall be submitted to the Surgeon General through the State agency an application by the State or a political subdivision thereof or by a public or other nonprofit agency. Such application shall set forth (1) a description of the site for such project, (2) plans and specifications therefor in accordance with the regulations prescribed by the Surgeon General under section 622 (c), (3) reasonable assurance that title to such site is or will be vested solely in the applicant, (4) reasonable assurance that adequate financial support will be available for the construction of the project and for its maintenance and operation when completed, and (5) reasonable assurance that the rates of pay for laborers and mechanics engaged in construction of the project will be not less than the prevailing local wage rates for similar work as determined in accordance with Public Law 403 of the Seventy-fourth Congress, approved August 30, 1935, as amended. The Surgeon General shall approve such application if sufficient funds to pay 33⅓ per centum of the cost of construction of such project are available from the allotment to the State, and if the Surgeon General finds (A) that the application contains such reasonable assurance as to title, financial support, and payment of prevailing rates of wages, (B) that the plans and specifications are in accord with the regulations prescribed pursuant to section 622, (C) that the application is in conformity with the State plan approved under section 623 and contains an assuran that the applicant will conform to the applicable requirements of the

State plan and of the regulations prescribed pursuant to section 622 (f) regarding the provision of facilities without discrimination on account of race, creed, or color, and for furnishing needed hospital facilities for persons unable to pay therefor, and an assurance that the applicant will conform to State standards for operation and maintenance, and (D) that it has been approved and recommended by the State agency and is entitled to priority over other projects within the State in accordance with the regulations prescribed pursuant to section 622 (d). No application shall be disapproved until the Surgeon General has afforded the State agency an opportunity for a hearing.

"(b) Upon approving an application under this section, the Surgeon General shall certify to the Secretary of the Treasury an amount equal to 33⅓ per centum of the estimated cost of construction of the project and designate the appropriation from which it is to be paid. Such certification shall provide for payment to the State, except that if the State is not authorized by law to make payments to the applicant the certification shall provide for payment direct to the applicant. Upon certification by the State agency, based upon inspection by it, that work has been performed upon a project, or purchases have been made, in accordance with the approved plans and specifications, and that payment of an installment is due to the applicant, the Surgeon General shall certify such installment for payment by the Secretary of the Treasury; except that if the Surgeon General, after investigation or otherwise, has ground to believe that a default has occurred requiring action pursuant to section 632 (a) he may, upon giving notice of hearing pursuant to such subsection, withhold certification pending action based on such hearing.

"(c) Amendment of any approved application shall be subject to approval in the same manner as an original application. Certification under subsection (b) may be amended, either upon approval of an amendment of the application or upon revision

of the estimated cost of a project. An amended certification may direct that any additional payment be made from the applicable allotment for the fiscal year in which such amended certification is made.

"(d) The funds paid under this section for the construction of an approved project shall be used solely for carrying out such project as so approved.

"(e) If any hospital for which funds have been paid under this section shall, at any time within twenty years after the completion of construction, (A) be sold or transfered to any person, agency, or organization, (1) which is not qualified to file an application under this section, or (2) which is not approved as a transferee by the State agency designated pursuant to section 623 (a) (1), or its successor, or (B) cease to be a nonprofit hospital as defined in section 631 (g), the United States shall be entitled to recover from either the transferor or the transferee (or, in the case of a hospital which has ceased to be a nonprofit hospital, from the owners thereof) 33⅓ per centum of the then value of such hospital, as determined by agreement of the parties or by action brought in the district court of the United States for the district in which such hospital is situated.

"Part D—Miscellaneous
"Definitions

"Sec. 631. For the purposes of this title—

"(a) the allotment percentage for any State shall be 100 per centum less that percentage which bears the same ratio to 50 per centum as the per capita income of such State bears to the per capita income of the continental United States (excluding Alaska), except that (1) the allotment percentage shall in no case be more than 75 per centum or less than 33⅓ per centum,

and (2) the allotment percentage for Alaska and Hawaii shall be 50 per centum each, and the allotment percentage for Puerto Rico shall be 75 percentum;

"(b) the allotment percentages shall be promulgated by the Surgeon General between July 1 and August 31 of each even-numbered year, on the basis of the average of the per capita incomes of the States and of the continental United States for the three most recent consecutive years for which satisfactory data are available from the Department of Commerce. Such promulgation shall be conclusive for each of the two fiscal years in the period beginning July 1 next succeeding such promulgation: *Provided*, That the Surgeon General shall promulgate such percentages as soon as possible after the enactment of this title, which promulgation shall be conclusive for the fiscal year ending June 30, 1947;

"(c) the population of the several States shall be determined on the basis of the latest figures certified by the Department of Commerce;

"(d) the term 'State' includes Alaska, Hawaii, Puerto Rico, and the District of Columbia;

"(e) the term 'hospital' (except as used in section 622 (a) and (b)) includes public health centers and general, tuberculosis, mental, chronic disease, and other types of hospitals, and related facilities, such as laboratories, out-patient departments, nurses' home and training facilities, and central service facilities operated in connection with hospitals, but does not include any hospital furnishing primarily domiciliary care;

"(f) the term 'public health center' means a publicly owned facility for the provision of public health services, including related facilities such as laboratories, clinics, and administrative offices operated in connection with public health centers;

"(g) the term 'nonprofit hospital' means any hospital owned and operated by a corporation or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual;

"(h) the term 'construction' includes construction of new buildings, expansion, remodeling, and alteration of existing buildings, and initial equipment of any such buildings; including architects' fees, but excluding the cost of off-site improvements and, except with respect to public health centers, the cost of the acquisition of land; and

"(i) the term 'cost of construction' means the amount found by the Surgeon General to be necessary for the construction of a project.

"Withholding of certification

"Sec. 632. (a) Whenever the Surgeon General, after reasonable notice and opportunity for hearing to the State agency designated in accordance with section 612(a) (1), finds that the State agency is not complying substantially with the provisions required by section 612 (a) to be contained in its application for funds under part B, or after reasonable notice and opportunity for hearing to the State agency designated in accordance with section 623 (a) (1) finds (1) that the State agency is not complying substantially with the provisions required by section 623 (a), or by regulations prescribed pursuant to section 622, to be contained in its plan submitted under section 623 (a), or (2) that any funds have been diverted from the purposes for which they have been allotted or paid, or (3) that any assurance given in an application filed under section 625 is not being or cannot be carried out, or (4) that there is a substantial failure to carry out plans and specifications approved by the Surgeon General under section 625, the Surgeon

General may forthwith notify the Secretary of the Treasury and the State agency that no further certification will be made under part B or part C, as the case may be, or that no further certification will be made for any project or projects designated by the Surgeon General as being affected by the default, as the Surgeon General may determine to be appropriate under the circumstances; and, except with regard to any project for which the application has alreary been approved and which is not directly affected by such default, he may withhold further certifications until there is no longer any failure to comply, or, if compliance is impossible, until the State repays or arranges for the repayment of Federal moneys which have been diverted or improperly expended.

"(b) (1) If the Surgeon General refuses to approve any application under section 625, the State agency through which the application was submitted, or if any State is dissatisfied with the Surgeon General's action under subsection (a) of this section, such State may appeal to the United States circuit court of appeals for the circuit in which such State is located. The summons and notice of appeal may be served at any place in the United States. The Surgeon General shall forthwith certify and file in the court the transcript of the proceedings and the record on which he based his action.

"(2) The findings of fact by the Surgeon General, unless substantially contrary to the weight of the evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Surgeon General to take further evidence, and the Surgeon General may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the transcript and record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive unless substantially contrary to the weight of the evidence.

"(3) The court shall have jurisdiction to affirm the action of the Surgeon General or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended.

"Federal hospital council; administration of title

"Sec. 633. (a) The Surgeon General is authorized to make such administrative regulations and perform such other functions as he finds necessary to carry out the provisions of this title. Any such regulations shall be subject to the approval of the Administrator.

"(b) In administering this title, the Surgeon General shall consult with a Federal Hospital Council consisting of the Surgeon General, who shall serve as Chairman ex officio, and eight members appointed by the Administrator. Four of the eight appointed members shall be persons who are outstanding in fields pertaining to hospital and health activities, three of whom shall be authorities in matters relating to the operation of hospitals, and the other four members shall be appointed to represent the consumers of hospital services and shall be persons familiar with the need for hospital services in urban or rural areas. Each appointed member shall hold office for a term of four years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and the terms of office of the members first taking office shall expire, as designated by the Administrator at the time of appointment, two at the end of the first year, two at the end of the second year, two at the end of the third year, and two at the end of the fourth year after the date of appoint-

ment. An appointed member shall not be eligible to serve continuously for more than two terms but shall be eligible for reappointment if he has not served immediately preceding his reappointment. The Council is authorized to appoint such special advisory and technical committees as may be useful in carrying out its functions. Appointed Council members and members of advisory or technical committees, while serving on business of the Council, shall receive compensation at rates fixed by the Administrator, but not exceeding $25 per day, and shall also be entitled to receive an allowance for actual and necessary travel and subsistence expenses while so serving away from their places of residence. The Council shall meet as frequently as the Surgeon General deems necessary, but not less than once each year. Upon request by three or more members, it shall be the duty of the Surgeon General to call a meeting of the Council.

"(c) In administering the provisions of this title, the Surgeon General, with the approval of the Administrator, is authorized to utilize the services and facilities of any executive department in accordance with an agreement with the head thereof. Payment for such services and facilities shall be made in advance or by way of reimbursement, as may be agreed upon between the Administrator and the head of the executive department furnishing them.

"Conferences of state agencies

"Sec. 634. Whenever in his opinion the purposes of this title would be promoted by a conference, the Surgeon General may invite representatives of as many State agencies, designated in accordance with section 612 (a) (1) or section 623 (a) (1), to confer as he deems necessary or proper. Upon the application of five or more of such State agencies, it shall be the duty of the Surgeon General to call a conference of representatives

of all State agencies joining in the request. A conference of the representatives of all such State agencies shall be called annually by the Surgeon General.

"State control of operations

"Sec. 635. Except as otherwise specifically provided, nothing in this title shall be construed as conferring on any Federal officer or employee the right to exercise any supervision or control over the administration, personnel, maintenance, or operation of any hospital with respect to which any funds have been or may be expended under this title."

Sec. 3. Paragraph (2) of section 208 (b) of the Public Health Service Act, as amended, is amended by inserting "(A)" before the words "to assist"; by striking out the word "paragraph" and inserting in lieu thereof the word "clause"; and by striking out the period at the end of such paragraph and inserting in lieu thereof a comma and the following: "and (B) to assist in carrying out the purposes of title VI of this Act, but not more than twenty such officers appointed pursuant to this clause shall hold office at the same time."

Sec. 4. Section 1 of the Public Health Service Act is amended to read:

"Section 1. Titles I to VI, inclusive, of this Act may be cited as the 'Public Health Service Act'."

Sec. 5. The Act of July 1, 1944 (58 Stat. 682), is hereby further amended by changing the number of title VI to title VII and by changing the numbers of sections 601 to 612, inclusive, and references thereto, to sections 701 to 712, respectively.

Approved August 13, 1946.

HOSPITAL SURVEY AND CONSTRUCTION AMENDMENTS OF 1949

63 Stat. 898

An Act to amend the Hospital Survey and Construction Act (title VI of the Public Health Service Act), to extend its duration and provide greater financial assistance in the construction of hospitals, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

This Act may be cited as the "Hospital Survey and Construction Amendments of 1949".

Extension of Duration and Increase in Authorized Appropriations

Sec. 2. (a) The first sentence of section 621 of the Public Health Service Act is amended to read as follows: "In order to assist the States in carrying out the purposes of section 601(b), there is hereby authorized to be appropriated for the fiscal year ending June 30, 1950, and for each of the five succeeding fiscal years, the sum of $150,000,000 for the construction of public and other nonprofit hospitals; and there are further authorized to be appropriated for such construction the sums provided in section 624."

(b) The paragraph "Grants for hospital construction" under the heading "Public Health Service" in the Federal Security Agency Appropriation Act, 1950, is amended by striking out "$75,000,000" and inserting in lieu thereof "$150,000,000".

Additional Federal Aid in Construction of Hospitals

Sec. 3. (a) Section 623 of the Public Health Service Act is amended by adding after subsection (d) the following new subsection:

"(e) The State plan may include standards for determination of the Federal share of the cost of projects approved in the State. Such standards shall provide equitably (and, to the extent practicable, on the basis of objective criteria) for variations between projects or classes of projects on the basis of the economic status of areas, relative need as between areas for additional hospital facilities, and other relevant factors. No such standards shall provide for a Federal share of more than 66⅔ per centum or less than 33⅓ per centum of the cost of construction of any project. The Surgeon General shall approve any such standards and any modifications thereof which comply with the provisions of this subsection."

(b) Sections 624 and 625 (b) of such Act are each amended by striking out "33⅓ per centum" and inserting in lieu thereof "the Federal share".

(c) Section 625(e) of such Act is amended by striking out "33⅓ per centum of the then value of such hospital, as determined by agreement of the parties or by action brought in the district court of the United States for the district in which such hospital is situated" and inserting in lieu thereof the following: "an amount bearing the same ratio to the then value (as determined by agreement of the parties or by action brought in the district court of the United States for the district in which such hospital is situated) of so much of the hospital as constituted an approved project or projects, as the amount of the Federal participation bore to the cost of the construction of such project or projects".

(d) Section 625 of such Act is amended by adding at the end thereof the following new subsection:

"(f) If the Surgeon General finds with respect to an application for a hospital project that—

"(1) the project is for the completion of a hospital the construction of which was commenced prior to the effective date of this subsection and without Federal aid under this title;

"(2) completion of construction is necessary for use of the completed portion as a hospital;

"(3) the State agency has certified that the applicant is unable, by use of all available funds and by exercise of reasonable effort in obtaining additional funds, to pay the non-Federal share (determined without regard to this subsection) of the cost of completing the hospital but will be able to complete construction with the additional Federal aid provided by this subsection;

"(4) the plans and specifications for the entire hospital are in accord with the regulations prescribed pursuant to section 622, or if not in accord with such regulations, meet substantially the objectives of such regulations;

"(5) the application meets all the requirements of subsection (a) of this section except in the respects covered by clauses (3) and (4) hereof and contains assurances applicable to the operation and maintenance of the entire hospital which meet the requirements of such subsection; and

"(6) the unobligated balance of the sum allotted to the State is equal to or greater than the Federal share of the estimated cost of construction of such project plus the additional amount specified below in this subsection;

he shall approve the application. Upon such approval the Federal share of the estimated cost of such project plus an additional amount not to exceed (1) 33⅓ per centum of the necessary cost to the applicant of the construction completed prior to such approval, or (2) the amount certified by the State agency as necessary to complete the construction of the hospital, whichever is less, shall constitute a contractual obligation of the Federal Government, and certifications for payment under subsection (b) of this section shall be on the basis of the Federal share plus such additional amount: *Provided*, That the total amount certified for payment shall not exceed the cost of construction of such project."

Administration of State Plans

Sec. 4. Section 632 (a) of such Act is amended by inserting after "under section 625," in clause (4) thereof the following: "or (5) that adequate State funds are not being provided annually for the direct administration of the State plan,".

Studies and Demonstrations Relating to Coordinated Use of Hospital Facilities

Sec. 5. Part D of title VI of such Act is amended by adding after section 635 the following new section:

"Studies and Demonstrations Relating to Coordinated Use of Hospital Facilities

"Sec. 636. In carrying out the purposes of section 301 with respect to hospital facilities, the Surgeon General is authorized to conduct research, experiments, and demonstrations relating to the effective development and utilization of hospital services,

facilities, and resources, and, after consultation with the Federal Hospital Council, to make grants-in-aid to States, political subdivisions, universities, hospitals, and other public and private nonprofit institutions or organizations for projects for the conduct of research, experiments, or demonstrations relating to the development, utilization, and coordination of hospital services, facilities, and resources. Any award made under this section for any such project in any fiscal year may include amounts for not to exceed the four succeeding fiscal years, and such amounts for such succeeding fiscal years shall constitute contractual obligations of the Federal Government: *Provided*, That the total expenditures for all such projects may not exceed $1,200,000 in any fiscal year."

Purpose of Act

Sec. 6. Section 601 of such Act is amended to read as follows:
"Sec. 601. The purpose of this title is—

"(a) to assist the several States to inventory their existing hospitals (as defined in section 631 (e)), to survey the need for construction of hospitals, and to develop programs for construction of such public and other nonprofit hospitals as will, in conjunction with existing facilities, afford the necessary physical facilities for furnishing adequate hospital, clinic, and similar services to all their people;

"(b) to assist in the construction of public and other nonprofit hospitals in accordance with such programs; and

"(c) to authorize the Surgeon General to conduct, and make grants for the conduct of, research, experiments, and demonstrations relating to the effective development and utilization of hospital services, facilities, and resources, and to promote the coordination of such experiments and demonstrations and the useful application of their results."

Minimum Allotment

Sec. 7. Section 624 of such Act is amended by striking out "$100,000" and inserting in lieu thereof "$200,000".

Filing of Applications

Sec. 8. Section 625(a) of such Act is amended to read as follows:

"(a) For each project for construction pursuant to a State plan approved under this part, there shall be submitted to the Surgeon General through the State agency an application by the State or a political subdivision thereof or by a public or other nonprofit agency. If two or more such agencies join in the construction of the project, the application may be filed by one or more of such agencies. Such application shall set forth (1) a description of the site for such project; (2) plans and specifications therefor in accordance with the regulations prescribed by the Surgeon General under section 622(e); (3) reasonable assurance that title, as defined in section 631 (j), to such site is or will be vested in one or more of the agencies filing the application or in a public or other non-profit agency which is to operate the hospital; (4) reasonable assurance that adequate financial support will be available for the construction of the project and for its maintenance and operation when completed; (5) reasonable assurance that the rates of pay for laborers and mechanics engaged in construction of the project will be not less than the prevailing local wage rates for similar work as determined in accordance with Public Law 403 of the Seventy-fourth Congress, approved August 30, 1935, as amended; and (6) a certification by the State agency of the Federal share for the project. The Surgeon General shall approve such application if sufficient funds to pay the Federal share of the cost of construction of such project are available from the allotment to the State, and if the Surgeon General finds (A) that the application contains such reasonable assurance as to title, financial

support, and payment of prevailing rates of wages; (B) that the plans and specifications are in accord with the regulations prescribed pursuant to section 622; (C) that the application is in conformity with the State plan approved under section 623 and contains an assurance that in the operation of the hospital there will be compliance with the applicable requirements of the State plan and of the regulations prescribed under section 622(f) regarding the provision of facilities without discrimination on account of race, creed, or color, and for furnishing needed hospital facilities for persons unable to pay therefor, and with State standards for operation and maintenance; and (D) that it has been approved and recommended by the State agency and is entitled to priority over other projects within the State in accordance with the regulations prescribed pursuant to section 622(d). No application shall be disapproved until the Surgeon General has afforded the State agency an opportunity for a hearing."

Definitions

Sec. 9. (a) Subsection (g) of section 631 of such Act is amended to read as follows:

"(g) the term 'nonprofit hospital' means any hospital which is owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual;".

(b) Such section is further amended by striking out "and" at the end of paragraph (h), by striking out the period at the end of paragraph (i) and inserting in lieu thereof a semicolon, and by inserting after paragraph (i) the following new paragraphs:

"(j) the term 'title', when used with reference to a site for a project, means a fee simple, or such other estate or interest (including a leasehold on which the rental does not exceed 4 per centum of the value of the land) as the Surgeon General finds sufficient to assure for a period of not

less than fifty years undisturbed use and possession for the purposes of construction and operation of the project;

"(k) the term 'Federal share' with respect to any project means the proportion of the cost of construction of such project to be paid by the Federal Government under part C. In the case of any project approved prior to the effective date of this subsection, the Federal share shall be 33⅓ per centum of the cost of construction of such project. In the case of any project approved on or after the effective date of this subsection, the Federal share shall be determined as follows:

"(1) if the State plan, as of the date of approval of the project application, contains standards approved by the Surgeon General pursuant to section 623(e), the Federal share with respect to such project shall be determined by the State agency in accordance with such standards;

"(2) if the State plan does not contain such standards, the Federal share shall be the amount (not less than 33⅓ per centum and not more than either 66⅔ per centum or the State's allotment percentage, whichever is the lower) established by the State agency for all projects in the State. *Provided*, That prior to the approval of the first project in the State during any fiscal year, the State agency shall give to the Surgeon General written notification of the Federal share established under this paragraph for projects in such State to be approved by the Surgeon General during such fiscal year, and the Federal share for projects in such State approved during such fiscal year shall not be changed after such approval."

Effective Date

Sec. 10. This Act shall take effect upon the date of its enactment. Approved October 25, 1949.

HOSPITAL AND MEDICAL FACILITIES AMENDMENTS OF 1964

78 Stat. 447

An Act to improve the public health through revising, consolidating, and improving the hospital and other medical facilities provisions of the Public Health Service Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

This Act may be cited as the "Hospital and Medical Facilities Amendments of 1964".

Sec. 2. Part B of title III of the Public Health Service Act (42 U.S.C. 243, et seq.) is amended by inserting at the end thereof the following new section:

"Special project grants for assisting in the areawide planning of health and related facilities

"Sec. 318. There are authorized to be appropriated $2,500,000 for the fiscal year ending June 30, 1965, and $5,000,000 for each of the next four fiscal years to enable the Surgeon General to make grants to the appropriate State agency or agencies designated in accordance with section 604(a)(1) to cover not to exceed 50 per centum of the costs of projects for developing (and from time to time revising) and supervising and assisting in the carrying out of comprehensive regional, metropolitan area, or other local area plans for coordination of existing and planned health facilities, and facilities related thereto, and services provided by such facilities."

Sec. 3. (a) Title VI of the Public Health Service Act (42 U.S.C., ch. 6A, subch. IV) is amended to read as follows:

"Title VI—Assistance for Construction and Modernization of Hospitals and Other Medical Facilities

"Declaration of purpose

"Sec. 600. The purpose of this title is—

"(a) to assist the several States in the carrying out of their programs for the construction and modernization of such public or other nonprofit community hospitals and other medical facilities as may be necessary, in conjunction with existing facilities, to furnish adequate hospital, clinic, or similar services to all their people;

"(b) to stimulate the development of new or improved types of physical facilities for medical, diagnostic, preventive, treatment, or rehabilitative services; and

"(c) to promote research, experiments, and demonstrations relating to the effective development and utilization of hospital, clinic, or similar services, facilities, and resources, and to promote the coordination of such research, experiments, and demonstrations and the useful application of their results.

"Part A—Grants and Loans for Construction and Modernization of Hospitals and Other Medical Facilities

"Authorization of appropriations for construction grants

"Sec. 601. In order to assist the States in carrying out the purposes of section 600, there are authorized to be appropriated—

"(a) for the fiscal year ending June 30, 1965, and each of the next four fiscal years—

"(1) $70,000,000 for grants for the construction of public or other nonprofit facilities for long-term care;

"(2) $20,000,000 for grants for the construction of public or other nonprofit diagnostic or treatment centers;

"(3) $10,000,000 for grants for the construction of public or other nonprofit rehabilitation facilities;

"(b) for grants for the construction of public or other nonprofit hospitals and public health centers and for grants for modernization of such facilities and the facilities referred to in paragraph (a), $150,000,000 for the fiscal year ending June 30, 1965, $160,000,000 for the fiscal year ending June 30, 1966, $170,000,000 for the fiscal year ending June 30, 1967, and $180,000,000 each for the next two fiscal years.

"State Allotments

"Sec. 602. (a) (1) Each State shall be entitled for each fiscal year to an allotment bearing the same ratio to the sums appropriated for each year pursuant to subparagraphs (1), (2), and (3), respectively, of section 601(a), and to an allotment bearing the same ratio to the new hospital portion of the sums appropriated for such year pursuant to section 601(b), as the product of—

"(A) the population of such State, and

"(B) the square of its allotment percentage,

bears to the sum of the corresponding products for all of the States. As used in this paragraph, the new hospital portion of sums appropriated pursuant to section 601(b) (which portion shall be available for grants for the construction of public or

other nonprofit hospitals and public health centers) is 100 per centum of such sums in the case of the fiscal year ending June 30, 1965, seven-eighths thereof in the case of the first fiscal year thereafter, twenty-seven thirty-fourths thereof in the case of the second fiscal year thereafter, thirteen-eighteenths thereof in the case of the third fiscal year thereafter, twenty-five thirty-sixths thereof in the case of the fourth fiscal year thereafter.

"(2) For each fiscal year beginning after June 30, 1965, the Surgeon General shall, in accordance with regulations, make allotments from the remainder of the sums appropriated pursuant to section 601(b) (which portion shall be available for grants for modernization of facilities referred to in paragraphs (a) and (b) of section 601) on the basis of the population, the extent of the need for modernization of the facilities referred to in paragraphs (a) and (b) of section 601, and the financial need of the respective States.

"(b) (1) The allotment to any State under subsection (a) for any fiscal year which is less than—

"(A) $25,000 for the Virgin Islands, American Samoa, or Guam and $50,000 for any other State, in the case of an allotment for grants for the construction of public or other nonprofit rehabilitation facilities,

"(B) $50,000 for the Virgin Islands, American Somoa, or Guam and $100,000 for any other State in the case of an allotment for grants for the construction of public or other nonprofit diagnostic or treatment centers, or

"(C) $100,000 for the Virgin Islands, American Samoa, or Guam and $200,000 for any other State in the case of an allotment for grants for the construction of public or other nonprofit facilities for long-term care or for the construction of public or other nonprofit hospitals and public health centers, or for the modernization of facilities referred to in paragraph (a) or (b) of section 601,

shall be increased to that amount, the total of the increases thereby required being derived by proportionately reducing the allotment from appropriations under such subparagraph or paragraph to each of the remaining States under subsection (a) of this section, but with such adjustments as may be necessary to prevent the allotment of any of such remaining States from appropriations under such subparagraph or paragraph from being thereby reduced to less than that amount.

"(2) An allotment of the Virgin Islands, American Samoa, or Guam for any fiscal year may be increased as provided in paragraph (1) only to the extent it satisfies the Surgeon General, at such time prior to the beginning of such year as the Surgeon General may designate, that such increase will be used for payments under and in accordance with the provisions of this part.

"(c) For the purposes of this part—

"(1) The 'allotment percentage' for any State shall be 100 per centum less that percentage which bears the same ratio to 50 per centum as the per capita income of such State bears to the per capita income of the United States, except that (A) the allotment percentage shall in no case be more than 75 per centum or less than 33⅓ per centum, and (B) the allotment percentage for the Commonwealth of Puerto Rico, Guam, American Samoa, and the Virgin Islands shall be 75 per centum.

"(2) The allotment percentages shall be determined by the Surgeon General between July 1 and September 30 of each even-numbered year, on the basis of the average of the per capita incomes of each of the States and of the United States for the three most recent consecutive years for which satisfactory data are available from the Department of Commerce, and the States shall be notified promptly thereof. Such determination shall be conclusive for each of the two fiscal years in the period beginning July 1 next succeeding such determination.

"(3) The population of the several States shall be determined on the basis of the latest figures certified by the Department of Commerce.

"(4) The term 'United States' means (but only for purposes of paragraphs (1) and (2)) the fifty States and the District of Columbia.

"(d) (1) Any sum alloted to a State, other than the Virgin Islands, American Samoa, and Guam for a fiscal year under this section and remaining unobligated at the end of such year shall remain available to such State, for the purpose for which made, for the next fiscal year (and for such year only), in addition to the sums allotted to such State for such purpose for such next fiscal year.

"(2) Any sum allotted to the Virgin Islands, American Samoa, or Guam for a fiscal year under this section and remaining unobligated at the end of such year shall remain available to it, for the purpose for which made, for the next two fiscal years (and for such years only), in addition to the sums allotted to it for such purpose for each of such next two fiscal years.

"(e) (1) Upon the request of any State that—

"(A) a specified portion of any allotment of such State under paragraph (1) of subsection (a), other than an allotment for grants for the construction of public or other nonprofit rehabilitation facilities, be added to another allotment of such State under paragraph (1) or (2) of such subsection, other than an allotment for grants for the construction of public or other nonprofit hospitals and public health centers, or

"(B) a specified portion of an allotment of such State under paragraph (2) of subsection (a) be added to an allotment of such State under paragraph (1) of such subsection,

and upon simultaneous certification to the Surgeon General by the State agency in such State to the effect that—

"(C) it has afforded a reasonable opportunity to make applications for the portion so specified and there have been no approvable applications for such portion, or

"(D) in the case of a request to transfer a portion of an allotment under paragraph (1) of subsection (a) for grants for the construction of public or other nonprofit hospitals and public health centers, use of such portion as requested by such State agency will better carry out the purposes of this title,

the Surgeon General shall promptly (but after application of subsection (b)) adjust the allotments of such State in accordance with such request and shall notify the State agency.

"(2) In addition to the transfer of portions of allotments under paragraph (1), the Surgeon General, upon the request of any State that a specified portion of an allotment of such State under paragraph (2) of subsection (a) be added to an allotment of such State under paragraph (1) of such subsection for grants for the construction of public or other nonprofit hospitals and public health centers and upon simultaneous certification to him by the State agency in such State to the effect that the need for new public or other nonprofit hospitals and public health centers is substantially greater than the need for modernization of facilities referred to in paragraph (a) or (b) of section 601, shall promptly (but after application of subsection (b) of this section) adjust the allotments of such State in accordance with such request and shall notify the State agency; except that not more than the following portions of allotments of a State under paragraph (2) of subsection (a) may be so added (under this paragraph) to allotments of such State under paragraph (1) of such subsection:

"(A) in the case of an allotment under paragraph (2) of subsection (a) for the fiscal year ending June 30, 1966, one-half of such allotment;

"(B) in the case of an allotment thereunder for the fiscal year ending June 30, 1967, three-sevenths of such allotment;

"(C) in the case of an allotment thereunder for the fiscal year ending June 30, 1968, two-fifths of such allotment; and

"(D) in the case of an allotment thereunder for the fiscal year ending June 30, 1969, five-elevenths of such allotment.

"(3) After adjustment of allotments of any State as provided in paragraph (1) or (2) of this subsection, the allotments as so adjusted shall be deemed to be the State's allotments under this section.

"(f) In accordance with regulations, any State may file with the Surgeon General a request that a specified portion of an allotment to it under this part for grants for construction of any type of facility, or for modernization of facilities, be added to the corresponding allotment of another State for the purpose of meeting a portion of the Federal share of the cost of a project for the construction of a facility of that type in such other State, or for modernization of a facility in such other State, as the case may be. If it is found by the Surgeon General (or, in the case of a rehabilitation facility, by the Surgeon General and the Secretary) that construction or modernization of the facility with respect to which the request is made would meet needs of the State making the request and that use of the specified portion of such State's allotment, as requested by it, would assist in carrying out the purposes of this title, such portion of such State's allotment shall be added to the corresponding allotment of the other State, to be used for the purpose referred to above.

"General regulations

"Sec. 603. The Surgeon General, with the approval of the Federal Hospital Council and the Secretary of Health, Education, and Welfare, shall by general regulations prescribe—

"(a) the general manner in which the State agency shall determine the priority of projects based on the relative need of different areas lacking adequate facilities of various types for which assistance is available under this part, giving special consideration—

"(1) in the case of projects for the construction of hospitals, to facilities serving rural communities and areas with relatively small financial resources;

"(2) in the case of projects for the construction of rehabilitation facilities, to facilities operated in connection with a university teaching hospital which will provide an integrated program of medical, psychological, social and vocational evaluation and services under competent supervision;

"(3) in the case of projects for modernization of facilities, to facilities serving densely populated areas; and

"(4) to the extent deemed feasible by the State agency, to hospital facilities which will include new or expanded facilities for nurse training;

"(b) general standards of construction and equipment for facilities of different classes and in different types of location, for which assistance is available under this part;

"(c) criteria for determining needs for general hospital and long-term care beds, and needs for hospitals and other facilities for which aid under this part is available, and for

developing plans for the distribution of such beds and facilities;

"(d) criteria for determining the extent to which existing facilities, for which aid under this part is available, are in need of modernization; and

"(e) that the State plan shall provide for adequate hospitals, and other facilities for which aid under this part is available, for all persons residing in the State, and adequate hospitals (and such other facilities) to furnish needed services for persons unable to pay therefor. Such regulations may also require that before approval of an application for a project is recommended by a State agency to the Surgeon General for approval under this part, assurance shall be received by the State from the applicant that (1) the facility or portion thereof to be constructed or modernized will be made available to all persons residing in the territorial area of the applicant; and (2) there will be made available in the facility or portion thereof to be constructed or modernized a reasonable volume of services to persons unable to pay therefor, but an exception shall be made if such a requirement is not feasible from a financial viewpoint.

"State plans

"Sec. 604. (a) Any State desiring to participate in this part may submit a State plan. Such plan must—

"(1) designate a single State agency as the sole agency for the administration of the plan, or designate such agency as the sole agency for supervising the administration of the plan;

"(2) contain satisfactory evidence that the State agency designated in accordance with paragraph (1) will have au-

thority to carry out such plan in conformity with this part;

"(3) provide for the designation of a State advisory council which shall include representatives of nongovernmental organizations or groups, and of public agencies, concerned with the operation, construction, or utilization of hospital or other facilities for diagnosis, prevention, or treatment of illness or disease, or for provision of rehabilitation services, and an equal number of representatives of consumers familiar with the need for the services provided by such facilities, to consult with the State agency in carrying out the plan, and provide, if such council does not include any representatives of nongovernmental organizations or groups, or State agencies, concerned with rehabilitation, for consultation with organizations, groups, and State agencies so concerned;

"(4) set forth, in accordance with criteria established in regulations prescribed under section 603 and on the basis of a statewide inventory of existing facilities, a survey of need, and (except to the extent provided by or pursuant to such regulations) community, area, or regional plans—

"(A) the number of general hospital beds and long-term care beds, and the number and types of hospital facilities and facilities for long-term care, needed to provide adequate facilities for inpatient care of people residing in the State, and a plan for the distribution of such beds and facilities in service areas throughout the State;

"(B) the public health centers needed to provide adequate public health services for people residing in the State, and a plan for the distribution of such centers throughout the State;

"(C) the diagnostic or treatment centers needed to provide adequate diagnostic or treatment services to

ambulatory patients residing in the State, and a plan for distribution of such centers throughout the State;

"(D) the rehabilitation facilities needed to assure adequate rehabilitation services for disabled persons residing in the State, and a plan for distribution of such facilities throughout the State; and

"(E) effective January 1, 1966, the extent to which existing facilities referred to in section 601(a) or (b) in the State are in need of modernization;

"(5) set forth a construction and modernization program conforming to the provisions set forth pursuant to paragraph (4) and regulations prescribed under section 603 and providing for construction or modernization of the hospital or long-term care facilities, public health centers, diagnostic or treatment centers, and rehabilitation facilities which are needed, as determined under the provisions so set forth pursuant to paragraph (4);

"(6) set forth, with respect to each of such types of medical facilities, the relative need, determined in accordance with regulations prescribed under section 603, for projects for facilities of that type, and provide for the construction or modernization, insofar as financial resources available therefor and for maintenance and operation make possible, in the order of such relative need;

"(7) provide minimum standards (to be fixed in the discretion of the State) for the maintenance and operation of facilities providing inpatient care which receive aid under this part and, effective July 1, 1966, provide for enforcement of such standards with respect to projects approved by the Surgeon General under this part after June 30, 1964;

"(8) provide such methods of administration of the State plan, including methods relating to the establishment and

maintenance of personnel standards on a merit basis (except that the Surgeon General shall exercise no authority with respect to the selection, tenure of office, or compensation of any individual employed in accordance with such methods), as are found by the Surgeon General to be necessary for the proper and efficient operation of the plan;

"(9) provide for affording to every applicant for a construction or modernization project an opportunity for a hearing before the State agency;

"(10) provide that the State agency will make such reports, in such form and containing such information, as the Surgeon General may from time to time reasonably require, and will keep such records and afford such access thereto as the Surgeon General may find necessary to assure the correctness and verification of such reports;

"(11) provide that the Comptroller General of the United States or his duly authorized representatives shall have access for the purpose of audit and examination to the records specified in paragraph (10); and

"(12) provide that the State agency will from time to time, but not less often than annually, review its State plan and submit to the Surgeon General any modifications thereof which it considers necessary.

"(b) The Surgeon General shall approve any State plan and any modification thereof which complies with the provisions of subsection (a). If any such plan or modification thereof shall have been disapproved by the Surgeon General for failure to comply with subsection (a), the Federal Hospital Council shall, upon request of the State agency, afford it an opportunity for hearing. If such Council determines that the plan or modification complies with the provisions of such subsection, the Surgeon General shall thereupon approve such plan or modification.

"Approval of projects for construction or modernization

"Sec. 605. (a) For each project pursuant to a State plan approved under this part, there shall be submitted to the Surgeon General, through the State agency, an application by the State or a political subdivision thereof or by a public or other nonprofit agency. If two or more such agencies join in the project, the application may be filed by one or more of such agencies. Such application shall set forth—

"(1) a description of the site for such project;

"(2) plans and specifications therefor, in accordance with regulations prescribed under section 603;

"(3) reasonable assurance that title to such site is or will be vested in one or more of the agencies filing the application or in a public or other nonprofit agency which is to operate the facility on completion of the project;

"(4) reasonable assurance that adequate financial support will be available for the completion of the project and for its maintenance and operation when completed;

"(5) reasonable assurance that all laborers and mechanics employed by contractors or subcontractors in the performance of construction or modernization on the project will be paid wages at rates not less than those prevailing on similar work in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a—276a-5); and the Secretary of Labor shall have with respect to the labor standards specified in this paragraph the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 5 U.S.C. 133z-15) and section 2 of the Act of June 13, 1934, as amended (40 U.S.C. 276c); and

"(6) a certification by the State agency of the Federal share for the project.

"(b) The Surgeon General shall approve such application if sufficient funds to pay the Federal share of the cost of such project are available from the appropriate allotment to the State, and if the Surgeon General finds (1) that the application contains such reasonable assurance as to title, financial support, and payment of prevailing rates of wages; (2) that the plans and specifications are in accord with the regulations prescribed pursuant to section 603; (3) that the application is in conformity with the State plan approved under section 604 and contains an assurance that in the operation of the project there will be compliance with the applicable requirements of the regulations prescribed under section 603(e), and with State standards for operation and maintenance; and (4) that the application has been approved and recommended by the State agency and is entitled to priority over other projects within the State in accordance with the regulations prescribed pursuant to section 603(a). Notwithstanding the preceding sentence, the Surgeon General may approve such an application for a project for construction or modernization of a rehabilitation facility only if it is also approved by the Secretary of Health, Education, and Welfare.

"(c) No application shall be disapproved until the Surgeon General has afforded the State agency an opportunity for a hearing.

"(d) Amendment of any approved application shall be subject to approval in the same manner as an original application.

"(e) Notwithstanding any other provision of this title, no application for a diagnostic or treatment center shall be approved under this section unless the applicant is (1) a State, political subdivision, or public agency, or (2) a corporation or association which owns and operates a nonprofit hospital (as defined in section 625).

"Payments for construction or modernization

"Sec. 606. (a) Upon certification to the Surgeon General by the State agency, based upon inspection by it, that work has been performed upon a project, or purchases have been made, in accordance with the approved plans and specifications, and that payment of an installment is due to the applicant, such installment shall be paid to the State, from the applicable allotment of such State, except that (1) if the State is not authorized by law to make payments to the applicant, or if the State so requests, the payment shall be made directly to the applicant, (2) if the Surgeon General, after investigation or otherwise, has reason to believe that any act (or failure to act) has occurred requiring action pursuant to section 607, payment may, after he has given the State agency notice of opportunity for hearing pursuant to such section, be withheld, in whole or in part, pending corrective action or action based on such hearing, and (3) the total of payments under this subsection with respect to such project may not exceed an amount equal to the Federal share of the cost of construction of such project.

"(b) In case an amendment to an approved application is approved as provided in section 605 or the estimated cost of a project is revised upward, any additional payment with respect thereto may be made from the applicable allotment of the State for the fiscal year in which such amendment or revision is approved.

"(c) (1) At the request of any State, a portion of any allotment or allotments of such State under this part shall be available to pay one-half (or such smaller share as the State may request) of the expenditures found necessary by the Surgeon General for the proper and efficient administration during such year of the State plan approved under this part; except that not more than 2 per centum of the total of the allotments of such State for a year, or $50,000, whichever is less, shall be available for such

purpose for such year. Payments of amounts due under this paragraph may be made in advance or by way of reimbursement, and in such installments, as the Surgeon General may determine.

"(2) Any amount paid under paragraph (1) to any State for any fiscal year shall be paid on condition that there shall be expended from State sources for such year for administration of the State plan approved under this part not less than the total amount expended for such purposes from such sources during the fiscal year ending June 30, 1964.

"Withholding of Payments

"Sec. 607. Whenever the Surgeon General, after reasonable notice and opportunity for hearing to the State agency designated as provided in section 604(a) (1), finds—

"(a) that the State agency is not complying substantially with the provisions required by section 604 to be included in its State plan; or

"(b) that any assurance required to be given in an application filed under section 605 is not being or cannot be carried out; or

"(c) that there is a substantial failure to carry out plans and specifications approved by the Surgeon General under section 605; or

"(d) that adequate State funds are not being provided annually for the direct administration of the State plan,

the Surgeon General may forthwith notify the State agency that—

"(e) no further payments will be made to the State under this part, or

"(f) no further payments will be made from the allotments of such State from appropriations under any one or

more subparagraphs or paragraphs of section 601, or for any project or projects, designated by the Surgeon General as being affected by the action or inaction referred to in paragraph (a), (b), (c), or (d) of this section,

as the Surgeon General may determine to be appropriate under the circumstances; and, except with regard to any project for which the application has already been approved and which is not directly affected, further payments may be withheld, in whole or in part, until there is no longer any failure to comply (or carry out the assurance or plans and specifications or provide adequate State funds, as the case may be) or, if such compliance (or other action) is impossible, until the State repays or arranges for the repayment of Federal moneys to which the recipient was not entitled.

"Judicial Review

"Sec. 608. (a) If the Surgeon General refuses to approve any application for a project submitted under section 605 or section 610, the State agency through which such application was submitted, or if any State is dissatisfied with his action under section 607 such State may appeal to the United States court of appeals for the circuit in which such State is located, by filing a petition with such court within sixty days after such action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Surgeon General, or any officer designated by him for that purpose. The Surgeon General shall thereupon file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Surgeon General or to set it aside, in whole or in part, temporarily or permanently, but until the filing of the record, the Surgeon General may modify or set aside his order.

"(b) The findings of the Surgeon General as to the facts, if supported by substantial evidence, shall be conclusive, but the court, for good cause shown, may remand the case to the Surgeon General to take further evidence, and the Surgeon General may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

"(c) The judgment of the court affirming or setting aside, in whole or in part, any action of the Surgeon General shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28 United States Code. The commencement of proceedings under this section shall not, unless so specifically ordered by the court, operate as a stay of the Surgeon General's action.

"Recovery

"Sec. 609. If any facility with respect to which funds have been paid under section 606 shall, at any time within twenty years after the completion of construction—

"(a) be sold or transferred to any person, agency, or organization (1) which is not qualified to file an application under section 605, or (2) which is not approved as a transferee by the State agency designated pursuant to section 604, or its successor, or

"(b) cease to be a public health center or a public or other nonprofit hospital, diagnostic or treatment center, facility for long-term care, or rehabilitation facility, unless the Surgeon General determines, in accordance with regulations, that there is good cause for releasing the applicant or other owner from this obligation,

the United States shall be entitled to recover from either the transferor or the transferee (or, in the case of a facility which has ceased to be public or nonprofit, from the owners thereof) an amount bearing the same ratio to the then value (as determined by the agreement of the parties or by action brought in the district court of the United States for the district in which the facility is situated) of so much of the facility as constituted an approved project or projects, as the amount of the Federal participation bore to the cost of the construction or modernization under such project or projects. Such right of recovery shall not constitute a lien upon said facility prior to judgment.

"Loans for Construction or Modernization of Hospitals and Other Medical Facilities

"Sec. 610. (a) In order further to assist the States in carrying out the purposes of this title, the Surgeon General is authorized to make a loan of funds to the applicant for any project for construction or modernization which meets all of the conditions specified for a grant under this part.

"(b) Except as provided in this section, an application for a loan with respect to any project under this part shall be submitted, and shall be approved by the Surgeon General, in accordance with the same procedures and subject to the same limitations and conditions as would be applicable to the making of a grant under this part for such project. Any such application may be approved in any fiscal year only if sufficient funds are available from the allotment for the type of project involved. All loans under this section shall be paid directly to the applicant.

"(c) (1) The amount of a loan under this part shall not exceed an amount equal to the Federal share of the estimated cost of construction or modernization under the project. Where a loan and a grant are made under this part with respect to the same project, the aggregate amount of such loan and such grant shall

not exceed an amount equal to the Federal share of the estimated cost of construction or modernization under the project. Each loan shall bear interest at the rate arrived at by adding one-quarter of 1 per centum per annum to the rate which the Secretary of the Treasury determines to be equal to the current average yield on all outstanding marketable obligations of the United States as of the last day of the month preceding the date the application for the loan is approved and by adjusting the result so obtained to the nearest one-eighth of 1 per centum. Each loan made under this part shall mature not more than forty years after the date on which such loan is made, except that nothing in this part shall prohibit the payment of all or part of the loan at any time prior to the maturity date. In addition to the terms and conditions provided for, each loan under this part shall be made subject to such terms, conditions, and covenants relating to repayment of principal, payment of interest, and other matters as may be agreed upon by the applicant and the Surgeon General.

"(2) The Surgeon General may enter into agreements modifying any of the terms and conditions of a loan made under this part whenever he determines such action is necessary to protect the financial interest of the United States.

"(3) If, at any time before a loan for a project has been repaid in full, any of the events specified in clause (a) or clause (b) of section 609 occurs with respect to such project, the unpaid balance of the loan shall become immediately due and payable by the applicant, and any transferee of the facility shall be liable to the United States for such repayment.

"(d) Any loan under this part shall be made out of the allotment from which a grant for the project concerned would be made. Payments of interest and repayments of principal on loans under this part shall be deposited in the Treasury as miscellaneous receipts.

"Part B—General

"Federal hospital council and advisory committees

"Sec. 621. (a) In administering this title, the Surgeon General shall consult with a Federal Hospital Council consisting of the Surgeon General, who shall serve as Chairman ex officio, and twelve members appointed by the Secretary of Health, Education, and Welfare. Six of the twelve appointed members shall be persons who are outstanding in fields pertaining to medical facility and health activities, and three of these six shall be authorities in matters relating to the operation of hospitals or other medical facilities, one of them shall be an authority in matters relating to the mentally retarded, and one of them shall be an authority in matters relating to mental health, and the other six members shall be appointed to represent the consumers of services provided by such facilities and shall be persons familiar with the need for such services in urban or rural areas.

"(b) Each appointed member shall hold office for a term of four years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term. An appointed member shall not be eligible to serve continuously for more than two terms (whether beginning before or after enactment of this section) but shall be eligible for reappointment if he has not served immediately preceding his reappointment.

"(c) The Council shall meet as frequently as the Surgeon General deems necessary, but not less than once each year. Upon request by three or more members, it shall be the duty of the Surgeon General to call a meeting of the Council.

"(d) The Council is authorized to appoint such special advisory or technical committees as may be useful in carrying out its functions.

"(e) Appointed Council members and members of advisory or technical committees, while serving on business of the Council, shall be entitled to receive compensation at rates fixed by the Secretary of Health, Education, and Welfare, but not exceeding $75 per day, including travel time, and, while so serving away from their places of residence, they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5 of the Administrative Expenses Act of 1946 (5 U.S.C. 73b-2) for persons in the Government service employed intermittently.

"Conference of state agencies

"Sec. 622. Whenever in his opinion the purposes of this title would be promoted by a conference, the Surgeon General may invite representatives of as many State agencies, designated in accordance with section 604, to confer as he deems necessary or proper. A conference of the representatives of all such State agencies shall be called annually by the Surgeon General. Upon the application of five or more of such State agencies, it shall be the duty of the Surgeon General to call a conference of representatives of all State agencies joining in the request.

"State control of operations

"Sec. 623. Except as otherwise specifically provided, nothing in this title shall be construed as conferring on any Federal officer or employee the right to exercise any supervision or control over the administration, personnel, maintenance, or operation of any facility with respect to which any funds have been or may be expended under this title.

"Studies and demonstrations relating to coordinated use of hospital facilities

"Sec. 624. (a) The Surgeon General is authorized to conduct research, experiments, and demonstrations relating to the ef-

fective development and utilization of services, facilities, and resources of hospitals or other medical facilities and, after consultation with the Federal Hospital Council, to make grants-in-aid to States, political subdivisions, universities, hospitals, and other public and nonprofit private institutions or organizations for projects for the conduct of research, experiments, or demonstrations relating to the development, utilization, and coordination of services, facilities, and resources of hospitals or other medical facilities, agencies, or institutions, and including the construction of units of hospitals or other medical facilities which involve experimental architectural designs or functional layout, the efficiency or economy of which can be tested and evaluated, or the demonstration thereof, and projects for acquisition of experimental or demonstration equipment for use in connection with hospitals or other medical facilities. Any award for any such project made from an appropriation under this section for any fiscal year may include such amounts as the Surgeon General determines to be necessary for succeeding fiscal years for completion of the Federal participation in the project as approved by the Surgeon General. Payments of any such grant may be made in advance or by way of reimbursement, and in such installments, as may be determined by the Surgeon General; and shall be made on such conditions as the Surgeon General finds necessary to carry out the purposes of this section. A grant under this section with respect to any project for construction of a facility or for acquisition of equipment (1) may not exceed $500,000, and (2) except where the Surgeon General determines that unusual circumstances make a larger percentage necessary in order to effectuate the purposes of this section, may not exceed 50 per centum of so much of the cost of such facility or such equipment as the Surgeon General determines is reasonably attributable to experimental or demonstration purposes. The provisions of clause (5) of the third sentence of subsection (a) of section 605 and any other provisions of such section which the Surgeon General deems appropriate shall be applicable, along with such other condi-

tions as the Surgeon General may determine, to grants under this section for projects for construction or for acquisition of equipment. There is authorized to be appropriated not to exceed $10,000,000 for any fiscal year to carry out the provisions of this section.

"(b) If, within twenty years after completion of any construction for which funds have been paid under this section—

"(1) the applicant or other owner of the facility shall cease to be a public or other nonprofit institution or organization, or

"(2) the facility shall cease to be used for the purposes for which it was constructed or for the provision of hospital or other services for which construction projects may be approved under this title (unless the Surgeon General determines, in accordance with regulations, that there is good cause for releasing the applicant or other owner from the obligation to do so),

the United States shall be entitled to recover from the applicant or other owner of the facility an amount bearing the same ratio to the then value (as determined by agreement of the parties or by action brought in the United States district court for the district in which such facility is situated) of the facility, as the amount of the Federal participation bore to the cost of construction of such facility. Such right of recovery shall not constitute a lien on such facility prior to judgment.

"Definitions

"Sec. 625. For the purposes of this title—

"(a) The term 'State' includes the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, and the District of Columbia.

"(b) The term 'Federal share' with respect to any project means the proportion of the cost of construction of such project to be paid by the Federal Government, determined as follows:

"(1) With respect to projects for which grants are made from allotments made from appropriations under paragraph (b) of section 601, the Federal share shall be whichever of the following the State elects:

"(A) the share determined by the State agency in accordance with standards, included in the State plan, which provide equitably for variations between projects on the basis of objective criteria related to the economic status of areas and, if the State so elects, such other factor or factors as may be appropriate and be permitted by regulations, except that such standards may not provide for a Federal share of more than 66⅔ per centum, or less than 33⅓ per centum, or

"(B) the amount (not less than 33⅓ per centum and not more than either 66⅔ per centum or the State's allotment percentage, whichever is lower) established by the State agency for all projects in the State;

"(2) With respect to projects for which grants are made from allotments made from appropriations under paragraph (a) of section 601, the Federal share shall be whichever of the following the State elects:

"(A) the share determined by the State agency in accordance with the standards, included in the State plan, and meeting the requirements set forth in subparagraph (A) of paragraph (1),

"(B) the amount (not less than 33⅓ per centum and not more than either 66⅔ per centum or the

State's allotment percentage, whichever is lower) established by the State agency for all projects in the State, or

"(C) 50 per centum of the cost of construction of the project.

The State agency shall, prior to the approval by it, under the State plan approved under part A, of the first project in the State during any fiscal year, give written notification to the Surgeon General of the Federal share which it has elected pursuant to paragraph (1), and the Federal share which it has elected pursuant to paragraph (2), of this subsection for projects in such State to be approved by the Surgeon General during such fiscal year, and such Federal share or shares for projects in such State approved by the Surgeon General during such fiscal year shall not be changed after approval of such first project by the State.

"(c) The term 'hospital' includes general, tuberculosis, and other types of hospitals, and related facilities, such as laboratories, out-patient departments, nurses' home and training facilities, and central service facilities operated in connection with hospitals, but does not include any hospital furnishing primarily domiciliary care.

"(d) The term 'public health center' means a publicly owned facility for the provision of public health services, including related publicly owned facilities such as laboratories, clinics, and administrative offices operated in connection with such a facility.

"(e) The term 'nonprofit' as applied to any facility means a facility which is owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

"(f) The term 'diagnostic or treatment center' means a facility for the diagnosis or diagnosis and treatment of ambulatory patients—

"(1) which is operated in connection with a hospital, or

"(2) in which patient care is under the professional supervision of persons licensed to practice medicine or surgery in the State, or, in the case of dental diagnosis or treatment, under the professional supervision of persons licensed to practice dentistry in the State.

"(g) The term 'rehabilitation facility' means a facility which is operated for the primary purpose of assisting in the rehabilitation of disabled persons through an integrated program of—

"(1) medical evaluation and services, and

"(2) psychological, social, or vocational evaluation and services,

under competent professional supervision, and in the case of which—

"(3) the major portion of the required evaluation and services is furnished within the facility; and

"(4) either (A) the facility is operated in connection with a hospital, or (B) all medical and related health services are prescribed by, or are under the general direction of, persons licensed to practice medicine or surgery in the State.

"(h) The term 'facility for long-term care' means a facility providing in-patient care for convalescent or chronic disease patients who require skilled nursing care and related medical services—

"(1) which is a hospital (other than a hospital primarily for the care and treatment of mentally ill or tuberculous patients) or is operated in connection with a hospital, or

"(2) in which such nursing care and medical services are prescribed by, or are performed under the general direction of, persons licensed to practice medicine or surgery in the State.

"(i) The term 'construction' includes construction of new buildings, expansion, remodeling, and alteration of existing buildings, and initial equipment of any such buildings (including medical transportation facilities); including architects' fees, but excluding the cost of off-site improvements and, except with respect to public health centers, the cost of the acquisition of land.

"(j) The term 'cost' as applied to construction or modernization means the amount found by the Surgeon General to be necessary for construction and modernization respectively, under a project, except that such term, as applied to a project for modernization of a facility for which a grant or loan is to be made from an allotment under section 602(a) (2), does not include any amount found by the Surgeon General to be attributable to expansion of the bed capacity of such facility.

"(k) The term 'modernization' includes alteration, major repair (to the extent permitted by regulations), remodeling, replacement, and renovation of existing buildings (including initial equipment thereof), and replacement of obsolete, built-in (as determined in accordance with regulations) equipment of existing buildings.

"(l) The term 'title', when used with reference to a site for a project, means a fee simple, or such other estate or interest (including a leasehold on which the rental does not exceed 4 per centum of the value of the land) as the Surgeon General finds sufficient to assure for a period of not less than fifty years' undisturbed use and possession for the purposes of construction and operation of the project."

(b) The amendment made by subsection (a) shall become effective upon the date of enactment of this Act, except that—

(1) all applications approved by the Surgeon General under title VI of the Public Health Service Act prior to such date, and allotments of sums appropriated prior to such date, shall be governed by the provisions of such title VI in effect prior to such date;

(2) allotment percentages promulgated by the Surgeon General under such title VI during 1962 shall continue to be effective for purposes of such title as amended by this Act for the fiscal year ending June 30, 1965;

(3) the terms of members of the Federal Hospital Council who are serving on such Council prior to such date shall expire on the date they would have expired had this Act not been enacted;

(4) the provisions of the fourth sentence of section 636 (a) of the Public Health Service Act, as in effect prior to the enactment of this Act, shall apply in lieu of the fourth sentence of section 624(a) of the Public Health Service Act, as amended by this Act, in the case of any project for construction of a facility or for acquisition of equipment with respect to which a grant for any part thereof or for planning such construction or equipment was made prior to the enactment of this Act;

(5) no application with respect to a project for modernization of any facility in any State may be approved by the Surgeon General, for purposes of receiving funds from an allotment under section 602(a) (2) of the Public Health Service Act, as amended by this Act, before July 1, 1965, or before such State has had a State plan approved by the Surgeon General as meeting the requirements of section 604(a) (4) (E) as well as the other requirements of section 604 of such Act as so amended.

Approved August 18, 1964.

HEALTH PROGRAMS EXTENSION ACT OF 1973

87 STAT. 91

An Act to extend through fiscal year 1974 certain expiring appropriations authorizations in the Public Health Service Act, the Community Mental Health Centers Act, and the Developmental Disabilities Services and Facilities Construction Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Short Title

Section 1. This Act may be cited as the "Health Programs Extension Act of 1973".

* * * * * * * *

Title IV—Miscellaneous
Miscellaneous

Sec. 401. (a) Section 601 of the Medical Facilities Construction and Modernization Amendments of 1970 is amended by striking out "1973" and inserting in lieu thereof "1974".

(b) The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act by any individual or entity does not authorize any court or any public official or other public authority to require—

(1) such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions; or

(2) such entity to—

(A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or

(B) provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedure or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

(c) No entity which receives a grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act after the date of enactment of this Act may—

(1) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(2) discriminate in the extension of staff or other privileges to any physician or other health care personnel,

because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.

Approved June 18, 1973.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-908

DR. JOHN G. MADRY, JR.,
Petitioner,

v.

DR. OTTO G. SOREL, DR. EDITH K. MANGONE, DR. JOHN T. BLACKBURN, DR. D. W. McMILLAN, BREVARD HOSPITAL ASSOCIATION, INC., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

ELTING L. STORMS
STORMS, PAPPAS & KRASNY, P.A.
Post Office Box 1376
Melbourne, Florida 32901
723-5646 (A.C. 305)
Attorneys for Respondents Brevard Hospital Association, Inc., Its Board of Governors and Officers

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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IN THE

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DR. JOHN G. MADRY, JR.,
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v.

DR. OTTO G. SOREL, DR. EDITH K. MANGONE, DR. JOHN T. BLACKBURN, DR. D. W. McMILLAN, BREVARD HOSPITAL ASSOCIATION, INC., and THE MEMBERS OF ITS BOARD OF GOVERNORS,[1]
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The order of the United States District Court for the Middle District of Florida is not reported; copy thereof is set forth in

[1] The individual members of the Board of Governors were named as defendants. They are: James E. Holmes, Chairman; Frederick L. McFarlin; Bernice S. Newell; R. P. Sullivan, Jr.; Harold E. O'Kelley; Dr. T. J. Kaminski; Dr. John M. Langstaff; Kathryn R. Lowery; Bernice A. Maxwell; John T. Turner, Jr.; Charles F. West, and Dr. James A. Sewell.

the Petitioner's Appendix A-5. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 558 F.2d 303, and copy is included in Petitioner's Appendix A-9. The order of the Court of Appeals denying rehearing and rehearing *en banc* is noted at 561 F.2d 831.

JURISDICTION

The jurisdictional requisites are sufficiently stated in the Petition.

QUESTION PRESENTED FOR REVIEW

Whether there is a sufficient state nexus to find that a private non-profit hospital is acting under color of state law in terminating the staff status of a physician where the corporate affairs and funds of the hospital are controlled and administered by a board of governors who are neither government officials nor government appointees and where regulation, licensing, tax exemption and receipt of Hill-Burton funds are not in any way related to the discharge by that hospital of a member of its medical staff.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V and Amendment XIV; 28 U.S.C. §1331 (a) (1970 ed.); 42 U.S.C.A. §1983, 17 Stat. 13, which are quoted on pages 3 and 4 of the Petition.

STATEMENT OF THE CASE

The Petitioner, Dr. John G. Madry, Jr., a licensed physician, brought this action in the District Court on June 27, 1969, against the Respondents, Brevard Hospital Association, Inc., a

nonprofit corporation, the members of its Governing Board and certain doctors on the medical staff, alleging that he had been permanently suspended as a member of the staff at the Hospital in May 1966, in violation of rights secured to him by the Constitution.

Doctor Madry joined the staff of Brevard Hospital on January 1, 1961. In May of 1966, he was permanently suspended from staff privileges by the Board of Governors of the Hospital after a series of violations of Hospital rules which persisted in the presence of written reprimands and two periods of probation—the last of which was the sterilization of a county welfare patient without her written consent.

In his Complaint Doctor Madry sought a Declaratory Judgment, a permanent injunction, reinstatement to the Hospital medical staff, and damages in excess of one million dollars. After protracted litigation in both the District Court and the Circuit Court of Appeals for the Fifth Circuit, the District Court on February 17, 1976, dismissed this case for lack of Federal jurisdiction.

The question of whether the District Court had jurisdiction of the case depends upon whether the action of the Board of Governors of the Hospital in terminating the staff status of Doctor Madry was "state action" or whether it was purely private action.

The history of the Brevard Hospital appears fully in the record and is summarized carefully in the Affidavits of James E. Holmes (Appendix A), Chairman of the Board of Governors, and Harry J. Underill (Appendix B), administrator of the Brevard Hospital, and we shall not belabor it here.

Brevard Hospital is a private, nonprofit, tax-exempt hospital. While it is true that the land on which the Hospital was built was purchased from the City of Melbourne, Florida, for a nominal price, the Hospital itself was paid for with funds received from a public fund-raising drive and through the use of Federal Hill-Burton funds. All additions to the Brevard Hos-

pital have been paid for primarily with donations from the public, Hill-Burton funds, and a mortgage loan from a savings and loan association.

Brevard Hospital is not owned by the Federal or State Government. It is not an instrumentality of government for the administration of any public duty, although the services it performs are in the public interest. The Board of Governors is the ultimate authority in determining Hospital policy and acts independently of any influence from the State of Florida or any political subdivision thereof. Its officers and members of the governing body are not appointed by and are not the representatives of government, notwithstanding that their authority stems from the corporate charter issued by the State. Although the Brevard Hospital by-laws at one time allowed two Brevard County commissioners and the mayors of ten Brevard County municipalities to serve as ex officio members of the Board of Governors, they served at the grace of the private corporation and could be removed by a by-law amendment of the corporation without the consent of the Florida Legislature, the Brevard County Commission or the officials of the various Brevard County municipalities. This step was in fact taken sometime after the dismissal of Doctor Madry, so that presently there are no public officials serving as "ex officio" members of the Board. There is evidence in the record that no ex officio member had ever participated as a member of the Board and that the Board acted independently of the City of Melbourne and Brevard County and that no ex officio member ever attended a Hospital Board meeting.[2]

On appeal the Court of Appeals for the Fifth Circuit affirmed the decision of the District Court and held that the actions of Brevard Hospital did not equal state action and, consequently, the District Court lacked jurisdiction to hear this case.

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[2] The Affidavit of the Hospital Administrator (Appendix B) clearly indicates that the municipal and county officials never participated as members of the Board and had never attended a Board meeting since October 1952, the date of the Administrator's employment.

REASONS FOR DENYING WRIT

Petitioner asks this Court to grant Certiorari and argues that the question presented is one of national scope involving an important question for which there is a need for a uniform rule in all the circuits.

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), this Court stated, "Only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance." 365 U.S. 715, 722.

The District Court "sifting facts and weighing circumstances" carefully examined all of the "points of contact" of the Brevard Hospital with government and found that there was nothing to indicate that the State was in any way involved with the dismissal of Doctor Madry from the medical staff of Brevard Hospital.

Nor does there exist here the symbiotic relationship between the City and the Hospital found existing in *Burton, supra.* Although the land on which the Hospital was built was sold by the City to the Hospital for a nominal price, the Hospital itself was paid for with funds received from a public fund-raising drive and through the use of Hill-Burton funds, and the Hospital is not part of a government project nor does the financial success of any government operation depend upon the medical staff policy promulgated by the Hospital. The Hospital is a self-sustaining medical facility whose operating funds are not supplied by any governmental entity.

This Court made it clear in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), that an action taken by a private corporation is not necessarily or automatically "state action" merely because the corporation is chartered by the state, or because the activities of the corporation are strictly regulated

by the state, or because the functions performed by the corporation serve the public convenience and necessity. Before the action in question can properly be characterized as "state action", there must be a "sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself". 419 U.S. at 351. In the instant case there is nothing to indicate that there was any connection between Doctor Madry's dismissal from the staff of the Hospital and the fact that the Hospital had received Hill-Burton or other public funds, or the fact that the Hospital has a tax-exempt status, or the fact that the Hospital was subject to State regulation. Hence, there is no such nexus between the State's relationship to the Hospital's operation and the dismissal of Doctor Madry as to justify attribution of the challenged action of the Hospital to the State.

This Court denied Applications for Writ of Ceriorari in *Greco v. Orange Memorial Hospital Corporation*, 423 U.S. 1000 (1975), and in *Taylor v. St. Vincents Hospital*, 424 U.S. 948 (1976). The Petitioners in both *Greco* and *Taylor* complained that the actions of the Respondent hospitals in refusing to perform elective abortions were unconstitutional in that they interfered with the liberty of a woman to choose whether or not to bear a child, in violation of the Fourteenth Amendment as construed in *Roe v. Wade*, 410 U.S. 113. The dissent to the denial of the Writ of Certiorari in *Greco* made reference to the difficult task of policing the Court's decision in *Roe v. Wade*, 410 U.S. 113, and *Doe v. Bolton*, 410 U.S. 179, and the Court's responsibility of resolving the problems arising in the wake of those decisions.

Respondents respectfully submit that this case did not arise in the wake of those decisions, and the finding of the Fifth Circuit that "state action" was not involved in the dismissal of Doctor Madry from the medical staff of Brevard Hospital is not appropriate for review. The decision in this case is not one

involving broad questions of general national importance but rather one where the Petitioner was merely unable to establish a sufficiently close nexus between the State and the Brevard Hospital to invoke subject matter jurisdiction.

This case is even less appropriate for review than was *Greco*, as the Order of Dismissal entered by the District Court found that the facts alleged in this case indicated a level of involvement by the State much lower than that of *Greco*. *Greco* thus presented a more substantial state-action issue than the present case in the light of *Burton v. Wilmington Parking Authority, supra.*

The view taken by the Court of Appeals for the Fifth Circuit in this case and the *Greco* case, *supra*, accords with that taken by sister circuits, other than the Fourth.[3]

Petitioner argues that there is an inconsistency in the holding by the Fifth Circuit in *Greco, supra*, and *Sosa v. Board of Managers of Val Verde Memorial Hospital*, 437 F. 2d 173 (5th Cir. 1971). The *Sosa* case can easily be distinguished from *Greco* and the case at bar as the Val Verde Memorial Hospital in *Sosa* was in fact not a private hospital, but rather a county institution owned by the county, constructed, maintained and operated with county funds and, more importantly, governed by a board of managers appointed by the county commissioners of Val Verde County.

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[3] *Taylor v. St. Vincents Hospital*, 523 F.2d (9th Cir. 1975), *cert. denied*, 424 U.S. 948; *Watkins v. Mercy Medical Center*, 520 F.2d 894 (9th Cir. 1975); *Ascherman v. Presbyterian Hospital of Pacific Medical Center, Inc.*, 507 F.2d 1103 (9th Cir. 1974); *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974); *Jackson v. Norton-Children's Hospital, Inc.*, 487 F.2d 502 (6th Cir. 1973); *Doe v. Bellin Memorial Hospital*, 479 F.2d 756 (7th Cir. 1973); *Ward v. St. Anthony Hospital*, 476 F.2d 671 (10th Cir. 1973); *Briscoe v. Bock*, 540 F.2d 392 (8th Cir. 1976); *Sokol v. University Hospital*, 420 F.Supp. 1029 (D. C. Mass. 1975); *Barrett v. United Hospital*, 376 F.Supp. 791 (S.D. N.Y. 1974); *Slavcoff v. Harrisburg Polyclinic Hospital*, 375 F.Supp. 999 (M.D. Pa. 1974).

In an effort to demonstrate that a conflict exists among the circuits on the question involved in this case and that this question has arisen with sufficient frequency to warrant this Court's attention, Petitioner has listed in his Appendix some 35 cases which have been decided over a period of 20 years in the different circuits. With the exception of those cases in the Fourth Circuit, all the cases which are cited as authority "for Federal jurisdiction found" are cases involving public hospitals owned and operated by a public authority, or are cases which were decided before *Jackson v. Metropolitan Edison Co., supra,* or they are cases where the state action question was not raised.

In the cases cited from the Fourth Circuit, the critical state involvement was in the very prohibited action under constitutional attack. In the leading case of *Simkins v. Moses H. Cone Memorial Hospital,* 323 F.2d 959 (4th Cir. 1963), *cert. denied,* 376 U.S. 938 (1964), the State of North Carolina distributed Hill-Burton funds to a private, racially segregated hospital pursuant to a State policy of racial discrimination in hospitals within the State. This activity violated the equal protection clause since it was promoting the hospital's blatant and continuing discriminatory practices and was placing the State's power and prestige behind the hospital's segregation policy. Such encouragement of prohibitive conduct consistently has been held to amount to state action.

Another case involving the equal protection clause is *Sams v. Ohio Valley General Hospital Association,* 413 F.2d 826 (4th Cir. 1969). There a private hospital receiving Hill-Burton funds refused to give staff privileges to doctors from other counties. Although this case concerned discrimination other than racial discrimination, it nonetheless involved state support to a hospital which arbitrarily denied its facilities to a segment of the population, contrary to the provisions of the "Hill-Burton Act." This again was an equal protection case.

The conduct which is challenged in the present case is the discharge of Doctor Madry from the medical staff of Brevard Hospital, and the record does not reflect any governmental involvement nor is the State and the Hospital so intertwined as to make them joint participants within the meaning of *Burton v. Wilmington Parking Authority, supra.*

CONCLUSION

For these reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ELTING L. STORMS
STORMS, PAPPAS & KRASNY, P.A.
Post Office Box 1376
Melbourne, Florida 32901
Attorney for Respondents Brevard
Hospital Association, Inc., Its Board
of Governors and Officers

APPENDIX

[253]

APPENDIX A

Exhibit "A"

In the District Court of the United States
For the Middle District of Florida

Dr. John G. Madry, Jr., Plaintiff, vs. Dr. Otto G. Sorel, et al., Defendants.	}	Civil Action No. 69-136-Orl.

Affidavit of James E. Holmes in Support of Defendants' Motion to Dismiss

State of Florida }
County of Brevard }

JAMES E. HOLMES, upon being duly sworn, deposes and says:

1. That he resides at 2800 S. Albemarle Drive, Melbourne, Florida; that he is a Member of the Board of Governors and is President of the Brevard Hospital Association Incorporated; that he has been a member of the said Board of Governors since 1952 and has been the President of said Corporation since 1954; and that he is familiar with the corporate history of the Brevard Hospital Association Incorporated.

2. Your Affiant avers that he attended and presided at a meeting of the Board of Governors in May, 1966, at which the Medical Staff privileges of the Plaintiff at the Brevard Hospital were permanently suspended; that the Plaintiff did not

request a specification of the charges against him or a hearing before the Board on those charges or the right to be present **[254]** at said meeting, and has not since said meeting requested from the Board a specification of charges or an opportunity for a hearing thereon; that the reasons for the suspension of the Plaintiff from the Staff were well known to the Plaintiff and are now, and have always been available to the Plaintiff were he to inquire of them.

3. That the Brevard Hospital Association was originally incorporated as a private corporation under the laws of the State of Florida and under the name of BREVARD HOSPITAL Association, a Corporation not for profit, pursuant to a proposed Charter which was filed before the Judge of the Circuit Court in and for the 23rd Judicial Circuit of the State of Florida, and approved by him on the 8th day of August, 1931, and recorded in the Public Records of Brevard County, Florida, in Incorporations Book 4 at Page 445, and that there is attached hereto and marked Exhibit "1", a copy of the original Charter of said Hospital.

4. That BREVARD HOSPITAL ASSOCIATION, INCORPORATED was re-incorporated under the provisions of Chapter 617 of the Florida Statutes pursuant to the Articles of Incorporation which were filed in the office of the Secretary of State of the State of Florida, on the 13th day of February, 1969; that there is attached hereto and marked Exhibit "2", a copy of these Articles of Incorporation.

That the BREVARD HOSPITAL ASSOCIATION, after first coming into existence, operated a small hospital on leased premises located in what is now known as the "Crenshaw Hotel" on River Drive in South Melbourne, Florida.

[255] Shortly after receipt of a gift of land located at N. Dixie Highway, Melbourne, Florda, from Mr. and Mrs. John B. Rodes, the BREVARD HOSPITAL ASSOCIATION, in the mid 1930's entered into an Agreement with the City of Melbourne and by the terms thereof, the Hospital Association was to convey said Hospital property acquired by gift, to the City of Melbourne. This conveyance was conditioned upon the City obtaining a Public Works Administration Loan and other necessary financing to construct a Hospital Facility on said property. Said agreement further provided that when the indebtedness incurred by the City for the construction costs was retired, that the City would then transfer the land and improvements back to the Hospital Association.

In accordance with said Agreement between the Association and the City, the City, in November, 1935, applied for and obtained a Public Works Administration Loan of forty five (45%) per cent of the cost of the Hospital, not to exceed, however, the sum of TWENTY THOUSAND FOUR HUNDRED AND FIFTY FOUR ($20,454.00) DOLLARS. In September, 1936, and after a Contract for the construction of the Hospital was awarded by the City, a referendum was held in said City whereby the issuance of THIRTY THOUSAND ($30,000.00) DOLLARS in Revenue Certificates, representing the balance of construction costs for the Hospital, was approved. By the terms of said Certificates, the repayment of the indebtedness evidenced thereby was to be made solely from the revenues derived from the Hospital and not considered a pledge of the general credit of the City. Actual construction of the Hospital was commenced in the Fall of 1936 and completed and accepted by the City in June of 1937.

[256] From June, 1937, until June 30, 1945, when the entire indebtedness incurred by the City of Melbourne on behalf of the Brevard Hospital was retired and paid in full, the Hospital property and improvements thereon were conveyed back to the Brevard Hospital Association by the City. During said eight (8) year period, the Hospital was managed by a Board of Governors elected by the Association Members, subject, however, to the approval of the City. Since June 30, 1945, the

Hospital has been operated by the Board of Governors elected annually by the Membership of the Association and completely independent of said City.

By virtue of a Special Act enacted by the Florida Legislature, a special free-holders' election was held in May, 1950, for the purpose of approving or disapproving a special tax district created for the purpose of owning, maintaining, supporting and operating the Brevard Hospital. This proposal was rejected by the electorate at said referendum election.

During the early 1950's, the Brevard Hospital, then located on North Dixie Highway, was enlarged on two occasions through the addition of a twenty bed wing and thereafter by the remodeling of the former Nurses' Home into a fifteen bed maternity unit and attendant delivery rooms.

In the month of April, 1956, a special election was called by the City of Melbourne to enable the electorate of said City to approve or disapprove a proposed sale by said City of certain property then owned by the City and which now constitutes the present Hospital Site. This measure was approved by the citizens, and accordingly, said property was sold and conveyed by the City to the Hospital.

[257] During the late 1950's, a fund raising drive was conducted by the Brevard Hospital Association and an amount in excess of One Million Dollars was contributed to a Hospital construction fund. These funds thus collected and a Hill-Burton Grant in excess of One Million Dollars were used to construct the present Hospital which was opened in 1962. With the use of operating funds, contributions, a Hill Harris Grant in excess of 1.3 Million Dollars, a 3.5 Million Dollar expansion program was commenced in January, 1968, and is now virtually completed; that BREVARD HOSPITAL ASSOCIATION, INCORPORATED is a private non profit Corporation, the management of which neither the State of Florida, or any agent, agency or instrumentality thereof participates.

/s/ JAMES E. HOLMES
Affiant

Sworn to and subscribed
before me this 6th day
of February, 1970.

(Illegible)
Notary Publice

My Commission Expires: April 9, 1973

[1394] **APPENDIX B**

United States District Court
Middle District of Florida
Orlando Division

Case No.
69-136-Orl-Civ-Y

Dr. John G. Madry, Jr.,

Plaintiff,

vs.

Dr. Otto G. Sorel, et al.,

Defendants.

Affidavit of Harry J. Underill in Support of Defendant, Brevard Hospital Association's Motion to Vacate or Modify Order Dated January 22, 1975

State of Florida }
County of Brevard }

HARRY J. UNDERILL, upon being duly sworn, deposes and says:

1. That he resides at 450 Bahama Drive, Indialantic, Florida; that he is the Administrator of Brevard Hospital located in Melbourne, Brevard County, Florida; that he has been so employed since October, 1952; and that he has personal knowledge of the matters set forth herein.

2. That your affiant was employed by the Brevard Hospital Association as Administrator of the Brevard Hospital in October, 1952, and has been employed continuously in that capacity and without interruption to the date of this affidavit.

3. That Brevard Hospital Association was originally incorporated as a private corporation under the laws of the State of Florida and under the name of Brevard Hospital Association, a corporation not for profit, pursuant to a proposed charter which was filed before the Judge of the Circuit Court in and for the Twenty-third Judicial Circuit of the State of Florida, and **[1395]** approved by him on the 8th day of August, 1931, and recorded in the Public Records of Brevard County, Florida, in Incorporations Book 4, at Page 445. There is attached hereto and marked Exhibit "A" a copy of the original charter of said Hospital.

4. That Brevard Hospital Association, Incorporated was reincorporated under the provisions of Chapter 617 of the Florida Statutes pursuant to the Articles of Incorporation which were filed in the Office of the Secretary of State of the State of Florida on the 13th day of February, 1969. A copy of said Articles of Incorporation is attached hereto and marked Exhibit "B".

5. That since October, 1952, the date of employment of your affiant by the Brevard Hospital Association, there has been no participation in the affairs of the Hospital by either municipal or county officials, and that since October, 1952, to the best of your affiant's knowledge, no city official or county official has ever attended a meeting of the Board of Governors or said Hospital. That the Brevard Hospital Association is a private non-profit corporation, and that as such neither the State of Florida, the County of Brevard, the City of Melbourne, or any agent, agency or instrumentality thereof participates.

6. Your affiant further states that as Administrator of the Brevard Hospital he is familiar with the by-laws of the Brevard

Hospital Association, that Article III, Section 1, Paragraph (A) of said By-Laws was not amended on June 6, 1973.

7. That the City of Melbourne on February 16, 1960, conveyed to the Brevard Hospital Association certain property then owned by the City and which now constitutes the present hospital site; that said conveyance was made by Special Warranty Deed dated February 16, 1960, recorded in Official Records Book 272, at Page 545, of the Public Records of Brevard County,

IN THE

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

THEODORE M. FORBES, JR.
GAMBRELL, RUSSELL, KILLORIN & FORBES
4000 First National Bank Tower
Atlanta, Georgia 30303

WILLIAM H. GLEASON
P.O. Box 3266
Indialantic
Melbourne, Florida 32903
723-5121 (A.C. 305)

THORWALD J. HUSFELD
LANDIS, GRAHAM, FRENCH, HUSFELD, SHERMAN & FORD, P.A.
110 West Indiana Avenue
P.O. Box 329
DeLand, Florida 32720

Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF AUTHORITIES

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PETITIONER'S REPLY MEMORANDUM

The Brief for Respondents in Opposition does not challenge directly the grounds stated for grant of the writ of certiorari. Respondents could not and do not deny that there is a division among the Circuits, although they attempt to play down the scope of the division and the importance of the issue raised.

Respondents' argument at pages 5-6 of their Brief concerning a need for nexus overlooks the many cases listed at pages A-1 through A-4 of the Petition for Writ of Certiorari in which nexus was not found to be essential [although in some cases it admittedly was, *e.g., Ward v. St. Anthony Hospital,* 476 F.2d 671, 675 (10th Cir. 1973)]. Respondents omit to state that the patient upon whom plaintiff allegedly performed the unauthorized

operation was a county welfare patient (R. 1374), whom the Respondent Hospital was required to accept as a patient by reason of § 622(f)(2) of the original Hill-Burton Act, 60 Stat. 1042 (p. A-61 of the Petition herein) and by renumbered § 603(e)(2) under the 1964 legislation (p. A-91 of the Petition herein); 42 USCA § 291c(e)(2).

The Respondents' discussion of the dissent in *Greco v. Orange Memorial Hospital Corp.*, 423 U.S. 1000 (1975), seems to miss the fact that two issues were raised by the Petition for Certiorari in that case. One was the issue raised herein; the other involved the constitutional right to elective abortion. The reference in the dissenting opinion to the "task of policing", 423 U.S. at 1006, appears to relate only to the latter issue.

At page 8 of their Brief, Respondents imply that federal jurisdiction as a consequence of Hill-Burton financing exists only in cases involving racial discrimination. In fact, that is only one area where jurisdiction has been found.

Of the sixteen cases listed on pages A-1 through A-4 of the Petition herein where Federal jurisdiction was found to exist, in only two, *Eaton v. Grubbs*, 329 F.2d 710 (4th Cir. 1964), and *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964), was racial discrimination the basis for the decision on the merits. In a third, *Foster v. Mobile County Hospital Board*, 398 F.2d 227 (5th Cir. 1968), racial discrimination was alleged, but the plaintiffs were found entitled to relied on non-racial grounds. Most of the other cases involved a denial of procedural "due process" and some a denial of "equal protection" by reason of residence, medical training or other non-racial, non-invidious classification.

To say that the Federal Courts have jurisdiction in "equal protection" cases, but not in "due process" cases is repugnant to the Constitution. The "due process" and "equal protection" clauses in Section 1 of the Fourteenth Amendment stand *in pari*

materia. Neither is elevated above the other. One cannot say that under our Federal Constitution one citizen's right to equal protection of the laws is superior to and more cognizable than another's right to due process of law. Nor did the Congress make any distinction in enacting 42 U.S.C. § 1983. It broad phraseology covers the entire panoply of Constitutional rights. And regardless of its Reconstruction Era origins, the Civil Rights Act of April 20, 1871, 17 Stat. 13, of which § 1983 is a part, applies equally to all citizens, not just those who have been subjected to racial discrimination. *Accord, Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), which assumed that a § 1983 action lay in that non-racial context if "state action" existed. (Mr. Justice Marshall's dissent in *Jackson* notes (419 U.S. at 374). "The Court has not adopted the notion, accepted elsewhere, that different standards should apply to state action analysis when different constitutional claims are presented.")

The existence of a double standard for "equal protection" cases and "due process" cases would itself constitute a denial of equal protection and due process.

Since the Petition herein was filed, the United States Court of Appeals for the Fifth Circuit accepted jurisdiction over another dispute between a physician and a hospital involving issues of due process of law. *Laje v. R. E. Thomason Gen'l Hospital*, 564 F.2d 1159 (5th Cir. 1977). The Court of Appeals characterized the defendant hospital as "a county hospital," without elaboration. Presumably, it would have been financed with Hill-Burton funds and apparently, like the Val Verde Memorial Hospital,[1] and unlike the Orange Memorial Hospital,[2] was considered to be county-owned.

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[1] Sosa v. Board of Managers of Val Verde Hospital, 437 F.2d 173 (5th Cir. 1971), set out at pp. A-37 *ff* of the Petition herein.

[2] Greco v. Orange Memorial Hospital Corp., 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975), set out at pp. A-17 *ff* of the petition herein.

The division among the Circuits and the rule that has developed in the Fifth Circuit that permits individual States to vary the availability of Federal jurisdiction from hospital to hospital requires the consideration of this Court so that a uniform standard of jurisdiction may be applied to all hospitals in the United States that are substantially financed with United States funds.

Respectfully submitted,

THEODORE M. FORBES, JR.
GAMBRELL, RUSSELL, KILLORIN & FORBES
4000 First National Bank Tower
Atlanta, Georgia 30303

WILLIAM H. GLEASON
P.O. Box 3266
Indialantic
Melbourne, Florida 32903
723-5121 (A.C. 305)

THORWALD J. HUSFELD
LANDIS, GRAHAM, FRENCH, HUSFELD, SHERMAN & FORD, P.A.
110 West Indiana Avenue
P.O. Box 329
DeLand, Florida 32720

Attorneys for Petitioner